Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term 2003

DARYL KEITH HOLTON,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

Capital Case
Execution Date June 8, 2005

PETITION FOR WRIT OF CERTIORARI

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- THIS IS A CAPITAL CASE -
Execution Date Set June 8, 2005

QUESTIONS PRESENTED

1) whether the death sentence in this case violates the Fifth and Fourteenth Amendments to the U.S. Constitution, since the aggravating circumstances used to enhance the maximum sentence for murder from life imprisonment to death were not charged in the indictment, and

2) whether precluding presentation of mitigating evidence in a capital sentencing trial violates the Eighth Amendment and Due Process where the Petitioner directed counsel not to present the evidence and the trial court ordered counsel to defer to Petitioner.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 8

A. The Tennessee Supreme Court Misapplied Federal Constitutional Law in Upholding the Tennessee Capital Sentencing Scheme and Petitioner's Death Sentence Since Aggravating Circumstances Used to Enhance the Maximum Punishment from Life Imprisonment to Death Were Not Charged in the Indictment 8

B. The Eighth Amendment and Due Process are Violated by Imposition and Execution of a Death Sentence Where the Sentencing Jury was Precluded from Considering Mitigating Evidence Due to an Order Directing Defense Counsel to Defer to Defendant's Instructions Regarding Presentation of Evidence 13

CONCLUSION 17

Appendix A - Opinion of the Supreme Court of Tennessee Dated January 5, 2004 ..... A-1

Appendix B - Opinion of the Court of Criminal Appeals of Tennessee Dated July 17, 2002 ..... A-45

Appendix C - Order Denying Petition for Rehearing Dated February 17, 2004 ..... A-104

Appendix D - Relevant Tennessee Statutes A-106

Appendix E - Indictment A-123

Appendix F - State's Notice to Seek the Death Penalty Dated April 20, 1998 ..... A-128

Appendix G - State's Supplemental Notice Seeking the Death Penalty Dated May 7, 1999 ..... A-132

TABLE OF CITED AUTHORITIES

Cases:

Apprendi v. New Jersey, 530 U.S. 466 (2000) ..... passim

Burford v. State, 845 S.W.2d 204, 207 (Tenn. 1992) 8

Commonwealth v. McKenna, 383 A.2d 174 (Pa. 1978) 15

Faretta v. California, 422 U.S. 806 (1975) 16

Furman v. Georgia, 408 U.S. 238 (1972) 14

Gregg v. Georgia, 428 U.S. 153 (1976) 13

Hitchcock v. Dugger, 481 U.S. 393 (1987) 14

Lockett v. Ohio, 438 U.S. 586 (1978) 13

Martinez v. Court of Appeal of California, Fourth Appellate District, 528 U.S. 152 (2000) 7, 16

Michigan v. Long, 463 U.S. 1032 (1983) 13

Newton v. Cox, 878 S.W.2d 105 (Tenn. 1994) 8

Penry v. Lynaugh, 492 U.S. 302 (1989) 7

People v. Deere, 710 P.2d 925 (Cal. 1985) 15, 16

Planned Parenthood of Middle Tennessee v. Sundquist, 38 S.W.3D 1, 12 (Tenn. 2000) 8

Riggs v. Burson, 941 S.W.2d 44 (Tenn. 1997) 8

Ring v. Arizona, 536 U.S. 584 (2002) ..... passim

State v. Brackett, 869 S.W.2d 936 (Tenn. Crim. App. 1993) .. 8

State v. Dellinger, 79 S.W.3d 458 (Tenn. 2002) 4

State v. Gilliland, 22 S.W.3d 266 (Tenn. 2000) 10

State v. Hale, 840 S.W.2d 307, 312 (Tenn. 1992) 8

State v. Holton, 126 S.W.3d 845 (Tenn. 2004) ..... passim

State v. Holton, 2002 WL 1574995 (Tenn. Crim. App. 2002). .1

State v. Martini, 677 A.2d 1106 (N.J. 1996) 15

Sumner v. Shuman, 483 U.S. 66 (1987) 13

United States v. Haynes, 269 F.Supp.2d 970 (W.D. Tenn. 2003) 9, 12

United States v. Higgs, 353 F.3d 281 (4th Cir. 2003) 9

Walton v. Arizona, 497 U.S. 639 (1990) 10

Woodson v. North Carolina, 428 U.S. 280 (1976) 14

Zagorski v. State, 983 S.W.2d 654 (Tenn. 1998) .. 3, 6, 7, 14

Statutes:

A.R.S. § 13-1105(C) 12

A.R.S. § 13-703 12

Tenn. Code Ann. § 39-13-202(3)(b) 10

Tenn. Code Ann. § 39-13-204(f) 11

Tenn. Code Ann. § 39-13-204(g) 7, 11

Tenn. Code Ann. § 39-13-204(i) 3, 11

Tenn. Code Ann. § 39-13-206(c) 5

Tenn. Code Ann. § 39-13-208 10

28 U.S.C. § 1257(a) 1

Constitutional Provisions:

United States Constitution, Fifth Amendment 8

United States Constitution, Eighth Amendment ... 1, 2, 7, 13, 16

United States Constitution, Fourteenth Amendment 1

United States Constitution, Article VI, cl. 2 8

Tennessee Constitution, Article I § 8 8

Tennessee Constitution, Article I § 14 ..... 2, 8

Tennessee Constitution, Article I § 16 2

Rules:

Tenn.R.Crim.P. 12.3(b) 10

Tenn. R. App. P. 39 6

Other authority:

Raybin, *Tennessee Criminal Practice and Procedure* § 4.3 (1984) 10

Sabelli, M., *Train Wrecks and Freeway Crashes: An ARgument for Fairness and Against Self Representation in the Criminal Justice System*, 91 J. Crim. L. & Criminology 161 (2000) . 16

PETITION FOR WRIT OF CERTIORARI

Petitioner Daryl Keith Holton respectfully requests that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Tennessee in this case.

OPINIONS BELOW

The opinion of the Tennessee Supreme Court is reported at *State v. Holton*, 126 S.W.3d 845 (Tenn. 2004) and is attached as Appendix ("App.") A at A-1. The opinion of the Tennessee Court of Criminal Appeals is at 2002 WL 1574995 (Tenn. Crim. App.) and is attached as App. B at A-46.

JURISDICTION

On January 5, 2004, the Tennessee Supreme Court filed its opinion in *State v. Holton*, 126 S.W.3d 845 (Tenn. 2004). App. at A-1. On February 17, 2004, the Tennessee Supreme Court filed its order denying Petitioner's rehearing motion. *See* Order in No. M2000-00766-SC-DDT-DD (February 17, 2004), attached as App. C at A-105. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States, provides in pertinent part, "[N]or shall any state deprive any person of life, liberty, or property, without due process of law ... ."

The Eighth Amendment to the Constitution of the United States,

states "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Tennessee Constitution, Article I § 14, states: "no person shall be put to answer any criminal charge but by presentment, indictment or impeachment."

The Tennessee Constitution, Article I § 16 states: "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The relevant provisions of Tennessee law are included below in App. D at A-107.

STATEMENT OF THE CASE

This case presents the question whether the state of Tennessee can refuse to apply the federal constitutional rule announced in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002), by allowing a maximum life sentence to be enhanced to death based on aggravating circumstances not charged in the indictment. Further, this case raises the issue of whether precluding presentation of mitigation evidence in a capital sentencing trial violates the Eighth Amendment and Due Process where the Petitioner directed counsel not to present the evidence and the trial court ordered counsel to defer to Petitioner. [1]

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[1]Throughout the course of this case, the trial judge ordered appointed counsel for the indigent Petitioner to defer to Petitioner's wishes as to what motions to file, which witnesses to call, and all tactical and strategic matters, including matters specific to mitigating evidence. *See* Transcript of Hearings on November 19, 1999 and January 14, 2000, p. 75 ("Zagorski versus State gave Mr. Holton unbridled control over the handling of his case during the

Petitioner Daryl Keith Holton was indicted on April 20, 1998, by the Bedford County Grand Jury on charges of first degree murder for the killings of Stephen Holton, Brent Holton, Eric Holton, and Kayla Holton on November 30, 1997. App. E at A-124-127. On April 20, 1998, the state filed a notice of its intent to seek the death penalty, identifying six statutory circumstances upon which the state relied. App. F at A-129. On May 7, 1999 the state filed a supplemental notice seeking the death penalty, reiterating the previously identified six statutory circumstances and identifying the indictment counts for which the state would seek application of the aggravating circumstances. App. G at A-133. Petitioner was tried in Bedford County by a jury which featured the Bedford County Attorney, John T. Bobo, as foreman. *See* Transcript of Motion for New Trial on February 24, 2000, p. 8. After deliberating for 50 minutes, the jury found Petitioner guilty on all four counts of first degree murder on June 15, 1999. *See* Transcript of Trial Proceedings, Vol. VIII at 1347. Following a brief sentencing trial, consisting primarily of argument, the jury deliberated for two hours before returning a death sentence. *Id.* at 1422. Pursuant to Petitioner's demands, counsel presented only one witness on Petitioner's behalf, a jail administrator who testified that Daryl Keith Holton was a good prisoner. *See State v. Holton*, 126 S.W.3d 845, 857 (Tenn. 2004). App. A at A-15. The state presented evidence of two aggravating circumstances[2]

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trial and before the trial.") *Zagorski v. State*, 983 S.W.2d 654 (Tenn. 1998), the authority cited by the trial judge, is a Tennessee Supreme Court decision requiring defense counsel to defer to a client's wishes regarding investigation and presentation of mitigating evidence according to procedures set forth in that case.

[2]The state relied upon the "mass murder" aggravating circumstance, "which is defined as the murder of three (3) or more persons whether committed during a single episode or at different times within a forty-eight-month period." Tenn. Code Ann. § 39-13-204(i)(12)(1997). App. D at A-118. With respect to the killings of three of the children, the state sought to establish that "the murder was committed against a person less than twelve (12) years of age and the defendant was eighteen (18) years of age, or older." Tenn. Code Ann.

and the trial court instructed the jury upon those two aggravating circumstances.

Petitioner requested that new counsel be appointed for purposes of the motion for a new trial – an essential component to preserving issues for appellate review in Tennessee – since he wished to raise claims regarding ineffective assistance of counsel in the motion and on appeal. *See* Transcript of Hearings on November 19, 1999 and January 14, 2000, pp. 67-70; Transcript of Trial Proceedings, Vol. VII at 994. The trial court denied his request and ordered appointed counsel to continue to represent Petitioner on the appeal. *See* Transcript of Hearings on November 19, 1999 and January 14, 2000, pp. 77-78; Transcript of Trial Proceedings, Vol. VII at 1001.

On Appeal to the Tennessee Supreme Court, following denial of relief in the Court of Criminal Appeals[3], Petitioner asserted, among other issues, that Tennessee's capital sentencing scheme is unconstitutional under *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Ring v. Arizona*, 536 U.S. 584 (2002) because the aggravating circumstances used to enhance a maximum life sentence to death are not charged in the indictment. Although the state argued that this claim was waived, the Tennessee Supreme Court addressed the issue on the merits and denied relief, relying upon its previous holding in *State v. Dellinger*, 79 S.W.3d 458, 467 (Tenn. 2002) that "[n]either the United States Constitution nor the Tennessee Constitution requires that the State charge in the indictment the aggravating factors to be relied

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§ 39-13-204(i)(1)(1997). App. D at A-116. *State v. Holton*, 126 S.W.3d at 857. App. A at A-14 to A-15.

[3]The Opinion of the Court of Criminal Appeals, dated July 17, 2002, is attached as App. B at A-46.

upon by the State during sentencing in a first degree murder prosecution." *State v. Holton*, 126 S.W.3d 862 (App. A at A-23 to A-24).

The Tennessee Supreme Court also conducted its mandatory review, pursuant to T.C.A. § 39-13-206(c)(1)(1997), of (1) whether the sentence of death was imposed in any arbitrary fashion; (2) whether the evidence supports the jury's finding of statutory aggravating circumstances; (3) whether the evidence supports the jury's finding that aggravating circumstances outweigh any mitigating circumstances; and (4) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant. *See State v. Holton*, 126 S.W.3d at 865-869.[4] (App. A at A-28.) As a result of the trial court's order requiring Petitioner's counsel to defer to Petitioner's instructions to not present mitigating evidence, the Tennessee Supreme Court was precluded from considering mitigating evidence in conducting this review.[5]

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[4]Justice Adolpho Birch dissented from affirming Petitioner's death sentence since "the comparative proportionality review protocol currently embraced by the majority is inadequate to shield defendants from the arbitrary and disproportionate imposition of the death penalty." *State v. Holton*, 126 S.W.3d at 872 (Birch, J., dissenting in part). App. A at A-36 to A-37.

[5]The Tennessee Supreme Court summarily states that "the evidence is sufficient to support the jury's findings that the aggravating circumstances so found outweighed mitigating circumstances beyond a reasonable doubt" without identifying mitigating circumstances. *Id.* at 865. App. A at A-28. In the proportionality analysis, the Tennessee Supreme Court compares Petitioner's case to several others and notes that in many of those cases the defendants "[u]nlike the present case ... presented extensive mitigating proof." *Id.* at 869.

The Tennessee Supreme Court approved the trial court's order based upon a previous case in which the court ruled that capital defendants may direct their attorneys to not present mitigating evidence on their behalf in capital sentencing trials – *Zagorski v. State*, 983 S.W.2d 654, 658 (Tenn. 1998). "Furthermore, a criminal defendant has the right and the authority to make substantive decisions concerning the presentation of his or her defense, including the right to forego the presentation of mitigating evidence during the sentencing phase of a capital trial. Defense counsel and the trial court complied with *Zagorski* and insured that the defendant's decision was voluntary, knowing, and intelligent." *State v. Holton*, 126 S.W.3d at 862 (citation omitted). Compliance with *Zagorski* includes the requirement that the trial court "shall not inquire of counsel as to the content of any known mitigating evidence." *Zagorski v. State*, 983 S.W.2d at 660. Thus the trial court precluded Petitioner from an offer of proof, sealed or otherwise, to make a record of the mitigating circumstances which might be present.[6]

The Tennessee Supreme Court affirmed Petitioner's conviction and sentence despite a process which prevented the sentencing jury from considering mitigating evidence and prevented counsel from proffering for the record the mitigation evidence which was available.

On January 15, 2004, Petitioner filed, pursuant to Tennessee Rules of Appellate Procedure, Rule 39, a petition for the Tennessee Supreme Court to rehear his case arguing that the court misapplied federal constitutional law in failing to require that aggravating circumstances which enhance a maximum

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[6]Petitioner presented a defense of insanity and/or diminished capacity and therefore at least some mitigating evidence was presented to the jury during the innocence/guilt trial.

sentence of life to death be charged in the indictment. Petitioner also asserted that applying the rule of *Zagorski* in Petitioner's case violated the fundamental due process and Eighth Amendment protections required in death penalty cases. He asserted that applying *Zagorski* almost certainly guaranteed a death sentence since Tennessee is a "weighing state" in which jurors are required to sentence a defendant to death if aggravating circumstances "outweigh" mitigating circumstances.[7] Also, Petitioner noted that preclusion of presentation of mitigating circumstances ensures that the jurors and judge who sentenced him to death did not and never will know the complete circumstances of life, character, and record and thus were unable to impose punishment directly related to his personal culpability, therefore violating a fundamental principle of law. *See, e.g., Penry v. Lynaugh*, 492 U.S. 302 (1989).

The Tennessee Supreme Court denied Petitioner's request for rehearing by Order dated February 17, 2004. *See* App. C at A-105. Petitioner, by and through undersigned counsel[8], requests that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Tennessee in this case.

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[7]*See* Tenn. Code Ann. § 39-13-204(g)(1) ("If the jury unanimously determines that: (A) At least one (1) aggravating circumstance or several statutory aggravating circumstances have been proven by the state beyond a reasonable doubt; and (B) Such circumstance or circumstances have been proven by the state to outweigh any mitigating circumstances beyond a reasonable doubt; then the sentence shall be death.") App. D at A-113.

[8]Undersigned counsel files this Petition consistent with the mandate of the trial court that counsel "is instructed to proceed with the appeal in any manner that [counsel] feel[s] is appropriate regardless of the desire of [Petitioner]." *See* Transcript of Hearings of November 19, 1999 and January 14, 2000 at p. 78. The trial court based its ruling on *Martinez v. Court of Appeal of California, Fourth Appellate District*, 528 U.S. 152 (2000) and undersigned counsel relies upon that case authority, as well as the directives of the court below in filing this petition.

REASONS FOR GRANTING THE WRIT

The Tennessee Supreme Court has decided two important questions of federal law in a way that conflicts with relevant decisions of this Court.

A. The Tennessee Supreme Court Misapplied Federal Constitutional Law in Upholding the Tennessee Capital Sentencing Scheme and Petitioner's Death Sentence Since Aggravating Circumstances Used to Enhance the Maximum Punishment from Life Imprisonment to Death Were Not Charged in the Indictment.

In the court below, Petitioner argued that the Tennessee capital murder sentencing statutes violate the U.S. Constitution because aggravating circumstances used to enhance the maximum punishment from life imprisonment to death are not charged in the indictment. Petitioner asserted that the "charged in the indictment" portion of the rule in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) requiring that any fact (other than a previous conviction) which increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt, applies in Tennessee since the Tennessee Constitution, Article I, § 14 provides for the right to a grand jury indictment in all felony cases.[9] Further, Petitioner

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[9]In Tennessee, there is "an absolute right to a criminal accusation by a grand jury." *State v. Brackett*, 869 S.W.2d 936, 938 (Tenn. Crim. App. 1993). The Tennessee Constitution's guarantee of prosecution only by grand jury in Article I, § 14 and due process found in Article I, § 8 are synonymous with, or more expansive than, the U.S. Constitution's corresponding guarantees in the Fifth and Fourteenth Amendments. *Riggs v. Burson*, 941 S.W.2d 44 (Tenn. 1997); *Newton v. Cox*, 878 S.W.2d 105, 110 (Tenn. 1994); *Burford v. State*, 845 S.W.2d 204, 207 (Tenn. 1992); *State v. Hale*, 840 S.W.2d 307, 312 (Tenn. 1992). The Supremacy Clause of the United States Constitution, Art. VI, cl. 2, which provides that the federal constitution is the ultimate "Law of the Land," "essentially mandates that no Tennessee law, whether statute, rule, or constitution, may operate to deprive a Tennessean any right afforded by the federal constitution." *Planned Parenthood of Middle Tennessee v. Sundquist*,

argued that this Court in *Ring v. Arizona*, 536 U.S. 584 (2002) confirmed the application of the *Apprendi* rule to aggravating circumstances in states where aggravating factors operate as the functional equivalent of an element of a greater offense.

The Tennessee Supreme Court upheld Petitioner's death sentence, holding that "*Ring* does not stand for the broad proposition that aggravating circumstances must be charged in the indictment to satisfy constitutional standards. Therefore, *Ring* provides no relief to the defendant and does not invalidate this Court's holding in *Dellinger*." *State v. Holton*, 126 S.W.3d at 863 (citations omitted). The court below misapplied federal constitutional law by failing to comprehend the holdings in *Apprendi* and *Ring* as separate branches of a unitary constitutional rule.[10]

The *Apprendi* portion of the rule requires that any fact (other than a previous conviction) which increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt. The *Ring* portion of the rule clarifies that aggravating circumstances are factors which increase the maximum penalty for murder in capital sentencing schemes structured like Tennessee. The

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38 S.W.3d 1, 12 (Tenn. 2000), citing *Miller v. State*, 584 S.W.2d 758, 760 (Tenn. 1979). Thus, the rule of *Apprendi/Ring* must be applied in Tennessee at least to the extent as provided in the federal courts.

[10]*See, e.g., United States v. Haynes*, 269 F. Supp.2d 970, 978 (W.D. Tenn. 2003); *United States v. Higgs*, 353 F.3d 281, 297 (4th Cir. 2003) ("Thus, the Supreme Court has not yet addressed the precise issue of whether, and to what extent, the Indictment Clause requires that the intent and aggravating factors be charged in the indictment. Higgs asserts that the principles of *Apprendi* and *Ring* dictate that any factor required to be submitted to the jury must be included in the indictment. We agree.")

clarification was necessary because a previous decision, *Walton v. Arizona*, 497 U.S. 639 (1990), characterized aggravating circumstances in capital cases as mere "sentencing considerations" and not "elements." The rule in *Apprendi* purported to invalidate such distinctions and, in fact, four justices had dissented in *Walton* due to the distinction drawn by the majority in that case. *Ring* resolved any question that aggravating circumstances were somehow exempt from the broad rule described by *Apprendi*.

The Tennessee capital sentencing scheme is structured similarly to the Arizona system reviewed in *Ring*.[11] Tennessee homicide and sentencing statutes provide for various degrees of homicide, including the crime of first degree murder, which is defined in Tenn. Code Ann. § 39-13-202 (1997). The penalty for first degree murder is a range between life and death. Tenn. Code Ann. § 39-13-202(3)(b)(1997). Death is a potential sentence only for first degree murder and only if a prosecutor chooses to seek death and files a written notice of aggravating circumstances. *See State v. Gilliland*, 22 S.W.3d 266 (Tenn. 2000) (notice is required to seek death and also to seek life imprisonment without parole; withdrawal of death notice without specifying intent to seek life imprisonment in a separate writing is an implicit withdrawal of intent to seek life imprisonment without parole). *See also* Tenn. R. Crim. P. 12.3(b)(requiring that the district attorney general give 30-days notice of an intent to seek the death penalty and state the applicable aggravating circumstances that the state intends to rely on in seeking the death penalty); Raybin, *Tennessee Criminal Practice and*

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[11]Tennessee does provide for capital sentencing by jury, rather than judge, so the "found by a jury beyond a reasonable doubt" part of the *Apprendi* rule is not at issue.

Procedure § 4.3 (1984) ("murder in the first degree is a capital crime only when the state alleges certain aggravating factors").[12]

Once a prosecutor does provide notice of aggravating factors, should a defendant be found guilty of first degree murder, the trial proceeds to a sentencing phase where the jury hears evidence of aggravating and mitigating circumstances. Tenn. Code Ann. § 39-13-204 (1997). App. D at A-108. Aggravating circumstances are set out in this statute, subsection (i), and must be found by the jury unanimously and beyond a reasonable doubt. At the time of the offense fourteen aggravating circumstances were incorporated in the statute. Tenn. Code Ann. § 39-13-204(i)(1997). If one or more aggravating circumstance is found, the maximum statutory penalty for first degree murder is increased from life in prison with possibility of parole, Tenn. Code Ann. § 39-13-204(f) (1997), to death, Tenn. Code Ann. § 39-13-204(g)(1997). App. D at A-110 to A-116. A chart of the procedure follows:

Crime	Additional Factor - Aggravating Circumstance	Maximum Penalty
First Degree Murder	None	Life w/possible parole
First Degree Murder	Yes	Death

Arizona's capital sentencing scheme as reviewed in *Ring*, like Tennessee's, provided that the punishment for first degree

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[12]As of July 1, 1993, Tennessee requires notice of intent to seek death penalty by statute as well. Tenn. Code Ann. § 39-13-208 (1997).

murder was a range between life imprisonment and death. A.R.S. § 13-1105(C). *See Ring v. Arizona*, 122 S.Ct. at 2434. If certain requirements were met, including the state's filing of a death notice, a judge then conducted a sentencing hearing, weighing aggravating and mitigating circumstances, and imposing a penalty. A.R.S. § 13-703. *Id.* Arizona's attempts to reconcile this cross-referenced statutory scheme with *Apprendi* were rejected in *Ring v. Arizona*. Tennessee's statutory scheme, with a general penalty section cross-referenced to more specific statutes requiring aggravating circumstances to justify the two most severe penalties, establishes aggravating circumstances as "the functional equivalent of an element of a greater offense" just as surely as Arizona's statute. As a result, aggravating circumstances in Tennessee are elements subject to the *Apprendi/Ring* rule: any fact that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.[13]

The Tennessee Supreme Court has misapplied federal constitutional law by failing to acknowledge that this Court in *Ring* applied the *Apprendi* rule to aggravating circumstances in the context of the jury sentencing prong of that rule, and not the indictment prong, *because the indictment issue was not before the Court*. However, the implications have been clear to most federal courts which have addressed the issue. *See United States v. Haynes*, 269 F.Supp.2d at 977-978 (collecting cases).

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[13]Respondent has asserted that the *Apprendi/Ring* rule does not apply in Tennessee. However, the Tennessee Attorney General, with the state of Nebraska and other state signatories, filed an amicus curiae brief in *Schriro v. Summerlin*, No. 03-526, indicating a concern that *Ring v. Arizona* might be applied retroactively in Tennessee.

By compartmentalizing the federal constitutional rules of law found in the Supreme Court decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Ring v. Arizona*, 536 U.S. 584 (2002), rather than synthesizing the holdings, the Tennessee Supreme Court inaccurately interpreted and, therefore, misapplied federal constitutional law in upholding the Tennessee capital sentencing scheme and Petitioner's death sentence.[14]

B. The Eighth Amendment and Due Process are Violated by Imposition and Execution of a Death Sentence Where the Sentencing Jury was Precluded from Considering Mitigating Evidence Due to an Order Directing Defense Counsel to Defer to Defendant's Instructions Regarding Presentation of Evidence.

The Eighth Amendment demands that capital defendants receive individualized sentencing consideration to ensure that death sentences do not result arbitrarily. *Gregg v. Georgia*, 428 U.S. 153, 196-98 (1976). This Court has repeatedly held that any capital sentencing scheme which keeps from the jury important, relevant mitigating circumstances is unconstitutional. *See Sumner v. Shuman*, 483 U.S. 66 (1987) (It is "constitutionally required that the sentencing authority has information sufficient to enable it to consider the character and individual circumstances of a defendant prior to imposition of a death sentence," quoting *Gregg v. Georgia*, 428 U.S. at 189-190, n. 38 (1976)); *Lockett v. Ohio*, 438 U.S. 586 (1978) (stating that the sentencing authority must be permitted to consider "as a mitigating factor, any aspect of a defendant's character or record

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[14]Because the Tennessee Supreme Court "'felt compelled by what it understood to be federal constitutional considerations to construe ... its own law in the manner that it did,'" there is no question about the jurisdiction of this Court. *Michigan v. Long*, 463 U.S. 1032, 1039 fn.4 (1983) (citations omitted).

and any of the circumstances of the offense."); *Hitchcock v. Dugger*, 481 U.S. 393 (1987) (a unanimous decision, in which a death sentence was invalidated because "the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of non-statutory mitigating circumstances.")

Tennessee has instituted a procedure which precludes capital sentencing juries from considering mitigating evidence by forcing appointed counsel to follow the dictates of often severely mentally ill clients. Petitioner was sentenced to death under this procedure by a jury which was not permitted to consider mitigating circumstances. Although the procedure was placed in effect to demonstrate respect for he individual,[15] ultimately the Tennessee Supreme Court's decision in *Zagorski* as applied in this case denies that respect by promoting the individual's execution. The ultimate disrespect for humanity is displayed in the deliberate extinguishment of human life. *See Furman v. Georgia*, 408 U.S. 238, 291 (1972) (Brennan, J., concurring)("In comparison to all other punishments today, then, the deliberate extinguishment of human life by the State is uniquely degrading to human dignity.")

The Tennessee Supreme Court's ruling in Petitioner's case affirmed a process which did not take into account mitigating circumstances in this case, and thus prevented the jury from accurately assessing punishment. *See Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (opinion of Stewart, Powell, and Stevens, JJ.):

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[15] *Zagorski v. State*, 983 S.W.2d at 658 (the defendant's strategic choices, even if detrimental, must be honored out of "that respect for the individual which is the lifeblood of the law.") (citing *Illinois v. Allen*, 397 U.S. 337, 350-51 (1970) (Brennan, J., concurring) as quoted in *Faretta v. California*, 422 U.S. 806 (1975) (footnote omitted)).

> A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.

By precluding the jury from considering mitigating circumstances, the process utilized in this case also undermined the public's interest in reliable death penalty determinations. *See People v. Deere*, 710 P.2d 925 (Cal. 1985). "The public has an interest in the reliability and integrity of a death sentence decision that transcends the preferences of individual defendants." *State v. Martini*, 677 A.2d 1106, 1107 (N.J. 1996). As the Pennsylvania Supreme Court, in *Commonwealth v. McKenna*, 383 A.2d 174, 181 (Pa. 1978), has noted:

> While this may be a genuine conviction on his part [for the defendant to choose death over life imprisonment], the waiver concept was never intended as a means of allowing a criminal defendant to choose his own sentence. Especially is this so where, as here, to do so would result in a state aided suicide. The waiver rule cannot be exalted to a position so lofty as to require this Court to blind itself to the real issue – the propriety of allowing the state to conduct an illegal execution of a citizen.

The decision of the Tennessee Supreme Court in Petitioner's case undermines the public interest in reliable sentencing and thus violates the Eighth Amendment and Due Process protections which are inherent in capital cases. The error is compounded by precluding counsel from making an offer of proof regarding the mitigating evidence available so that the Tennessee Supreme Court could consider the mitigating circumstances in the case to determine whether the death sentence is a proportionate punishment.

This Court has not specifically addressed this issue previously. However, due to the increasing number of cases in which capital defendants are utilizing the justice system as a means of committing state-aided suicide or otherwise asserting *Faretta* or penumbral *Faretta* rights to subvert the justice system,[16] this Court should grant review of this case. *See Faretta v. California*, 422 U.S. 806 (1975). The Court has previously recognized that a defendant's interests in determining the course of his case must be balanced against the "government's interest in ensuring the integrity and efficiency" of the judicial system. *Martinez v. Court of Appeal of California, Fourth Appellate District*, 528 U.S. 152, 162 (2000). In Petitioner's case, the government's interest in assuring the integrity of the system includes its interest in ensuring that the death sentence not be meted out arbitrarily and that the criminal justice system not be perverted into a suicidal instrument. Petitioner's death sentence, since it was the product of a process which precluded consideration of mitigating circumstances "violate[s] the fundamental public policy against misusing the judicial system to commit a state-aided suicide." *People v. Deere*, *supra*, 710 P.2d 925 (Cal. 1985).

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[16]*See, e.g.*, Sabelli, M., *Train Wrecks and Freeway Crashes: An Argument for Fairness and Against Self Representation in the Criminal Justice System*, 91 J. Crim. L. & Criminology 161 (2000).

CONCLUSION

Wherefore, for the reasons stated herein, the Court requests that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Tennessee in this case.

Respectfully submitted,

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APPENDICES

Appendix A

Opinion of the Supreme Court of Tennessee

Dated January 5, 2004

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

October 3, 2003 Session

Heard at Murfreesboro[1]

STATE OF TENNESSEE v. DARYL KEITH HOLTON

Direct Appeal from the Court of Criminal Appeals

Circuit Court for Bedford County

No. 14302 William Charles Lee, Judge

NO. M2000-00766-SC-DDT-DD - Filed January 5, 2004

The defendant, Daryl Keith Holton, was convicted of four counts of first degree premeditated murder. The jury imposed a sentence of death on each conviction, finding that the prosecution had proven beyond a reasonable doubt the existence of one or more aggravating circumstances[2] and that the aggravating circumstances so proven

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[1]This case was heard as part of the October 3, 2003, S.C.A.L.E.S. (Supreme Court Advancing Legal Education for Students) project in Murfreesboro, Rutherford County, Tennessee.

[2]As to three of the convictions, the jury relied upon both the age of the victim and the mass murder aggravating circumstances in imposing the death penalty. *See* Tenn. Code Ann. § 39-13-204(i)(1) & (12)(1997). As to the fourth conviction, the jury based imposition of the death penalty solely upon

outweighed any and all mitigating circumstances beyond a reasonable doubt. The defendant appealed, challenging both his convictions and sentences. After fully considering the defendant's claims, the Court of Criminal Appeals affirmed the convictions and the sentences. The case was then docketed in this Court, briefs were filed, and after considering the briefs and the record, this Court entered an Order requesting that the parties address certain issues at oral argument, including the sufficiency of the convicting evidence, the constitutionality of the statutory insanity defense, the constitutionality of Tennessee's capital sentencing scheme in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Ring v. Arizona*, 536 U.S. 584 (2002), and the propriety of the death sentences in light of the mandatory review required by Tennessee Code Annotated section 39-13-206(c)(A)-(D)(1997). After carefully and fully considering the issues in light of the record and the relevant authority, we affirm the defendant's convictions and sentences.

Tenn. Code Ann. § 39-13-206(A)(1); Judgments of the Trial Court and Court of Criminal Appeals Confirmed

FRANK F. DROWOTA, III, C.J., delivered the opinion of the court, in which E. RILEY ANDERSON, JANICE M. HOLDER, and WILLIAM M. BARKER, JJ., joined. ADOLPHO A. BIRCH, JR., filed a concurring-dissenting opinion.

John E. Appman, Jamestown, Tennessee (at trial and on appeal); Donna Hargrove, A. Jackson Dearing, III, and Larry F. Wallace, Jr., Assistant Public Defenders, Fayetteville, Tennessee (at trial), for the appellant, Daryl Keith Holton.

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the mass murder aggravating circumstance.

Paul G. Summers, Attorney General and Reporter; Michael E. Moore, Solicitor General; Mark E. Davidson, Assistant Attorney General; W. Michael McCown, District Attorney General; and Weakley E. Barnard, Robert G. Crigler, and Ann L. Filer, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

I. Background

A. Guilt Phase

On November 30, 1997, the defendant, thirty-six-year-old Daryl Keith Holton, shot and killed his four children, four, six, ten, and twelve years old. The State charged the defendant with four counts of premeditated murder. The critical issue at trial was the defendant's mental state at the time of the killings.

The State's proof showed that the defendant and Crystal Holton, the mother of the victims, married in 1984 while the defendant was serving in the United States Army and stationed at Fort Jackson in South Carolina. Shortly after their marriage, the defendant was reassigned to a post in Germany where he administered a dental clinic. While the defendant was stationed in Germany, the couple had two sons: Stephen, born in 1985, and Brent, born in 1987. Mrs. Holton testified that the defendant "loved" his military career, but she characterized their marriage as "up and down."

After his tour of duty in Germany, the defendant was stationed at Fort Gordon in Georgia. While there, he volunteered for service in Saudi Arabia at the conclusion of the 1991 Gulf War. Mrs. Holton remained in the United States with Stephen and Brent, and on September 17, 1991, she gave birth to a third son, Eric, who was hearing-impaired. Shortly after Eric's birth, the federal government incorrectly routed the defendant's paychecks causing Mrs. Holton serious financial difficulties. Also during the fall of 1991 Mrs. Holton

left her children home alone overnight while she went to a country music bar and dance hall. The police were called after one of the children arrived at a neighbor's house looking for his mother. When Mrs. Holton returned home the next morning, the police declined to bring criminal charges, and representatives of the Georgia Department of Children's Services allowed Mrs. Holton to retain custody of the children.

After learning of these events, the defendant secured an emergency leave of absence and returned to the United States for several days. During the time, the defendant moved his family from Georgia to his father's home in Shelbyville, Tennessee. However, after the defendant returned to Saudi Arabia, Mrs. Holton left Shelbyville to visit a cousin in Indiana and thereafter moved to South Carolina, leaving the children in the custody of the defendant's father. The defendant obtained a hardship discharge and returned to Shelbyville so that he could care for his children. In June of 1992, he returned to Georgia and obtained a divorce and custody of the three boys. He and the children returned to Shelbyville; however, Mrs. Holton testified that the defendant brought the children to visit her in South Carolina two or three times each month.

After Mrs. Holton became pregnant in late 1992 as a result of a "one night stand," she and the defendant reconciled and lived together in Shelbyville. On June 22, 1993, Mrs. Holton gave birth to her daughter, Kayla Marie. According to Mrs. Holton, the defendant accepted Kayla "rather well" and gave her his last name. Although the couple did not remarry, they lived together with the four children for approximately two years. During this time, Mrs. Holton drank heavily, and the defendant struck her on several occasions, blaming his violence on her drinking.

Eventually Mrs. Holton and the children left the defendant and moved into public housing in Murfreesboro, Tennessee. The defendant visited the children on a daily basis while they lived in Murfreesboro and was at some point awarded weekend visitation

rights. Mrs. Holton testified that the defendant would pick up the children on Friday and return them on Sunday. Mrs. Holton related that the defendant expressed concern about the crime rate in the neighborhood where she and the children lived and frequently complained about the condition of her apartment. Mrs. Holton admitted that she was a mediocre housekeeper, that she regularly accepted money from the defendant for the purchase of alcohol, and that she purchased several pint-sized bottles of liquor each week. However, Mrs. Holton said she had not demanded money or liquor as a condition of the defendant's visitation with the children.

Mrs. Holton testified that the visitation happened without incident until one Sunday night in 1995 when the defendant refused to let the children get out of his car and ordered Mrs. Holton to get into the car if she ever wanted to see the children again. When Mrs. Holton refused, the defendant said, "Fine. You are going to regret it," and drove away. Mrs. Holton, who had the impression that the defendant was armed,[3] immediately called the police. Learning of this former wife's call from a police "scanner" in his car, the defendant surrendered the children to the police unharmed. Mrs. Holton recalled that after this incident the defendant continued to threaten that she would "regret it" if she ever took his children away from him. Mrs. Holton acknowledged that, at some point while she and the children were living in Murfreesboro, the Tennessee Department of Children's Services *852 briefly obtained legal custody of the children, although Mrs. Holton retained physical custody. Thereafter, on February 27, 1996, the defendant and Mrs. Holton agreed to the entry of an order by the Bedford County Juvenile Court granting Mrs. Holton custody of the children. The order stated that the defendant agreed "it would be in the best interest of the minor children that full custody be granted to the natural mother with visitation to be at the discretion of the mother."

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[3]In his confession to the homicides in this case, the defendant admitted that he had been armed during the 1995 incident.

The defendant continued to visit the children until the late summer or early fall of 1997, when Mrs. Holton obtained an order of protection and moved with the children to a different residence. In the fall of 1997, Mrs. Holton became romantically involved with Morris Rhodes. In October 1997 she and the children moved to Rhodes' home in Spring Hill, Tennessee.

Although he knew that Mrs. Holton and the children had left their apartment in Murfreesboro, the defendant did not know where they had gone until late November of 1997. On Thanksgiving Day of that year, Mrs. Holton attempted to telephone the defendant at his uncle's garage in Shelbyville, where the defendant lived and worked. No one answered; however, the next day, the defendant returned Mrs. Holton's call. When Mrs. Holton told the defendant that the children "missed him and ... wanted him to take them Christmas shopping," the defendant responded that "he didn't think anybody remembered he was still their dad," expressed concern that the children might be calling Mr. Rhodes "Dad," and said that he never wanted them to think that anyone else was their father. After reassuring the defendant about his relationship with the children, Mrs. Holton made arrangements for him to visit with the children on Sunday, November 30. The defendant telephoned Mrs. Holton again on Saturday, November 29, to inquire whether he should purchase the children clothing during the Sunday visit. He also asked permission to take the children to a movie in Shelbyville and remarked that he wanted to take the children by the garage where he lived and worked so they could see a dog he kept there.

As agreed, the defendant picked up the four children at a Murfreesboro Wal-Mart around 3 p.m. on Sunday. The children were excited about the visit. They ran to the defendant and hugged him. Two of the children gave the defendant a drawing that said "From Brent and Kayla. I love you Daddy." Although the defendant returned their embraces, Mrs. Holton said he appeared detached or

"numb." The defendant agreed to return the children to Mrs. Holton at 9:30 p.m. at the Rutherford County Sheriff's Department.[4]

The defendant did not arrive as planned, however. Instead, he walked into the Shelbyville Police Department around 9:45 p.m. that night and told the dispatcher that he wanted to report a "homicide times four." The dispatcher described the defendant as calm and said he displayed no emotion. The dispatcher radioed for an officer and asked the defendant to wait in the lobby. Soon thereafter, an officer arrived and approached the defendant. After giving his name, address, and birth date, the defendant again indicated that he wished to report four homicides. When the officer asked how the defendant learned of the homicides, the defendant responded that he had killed his four children and then stood and placed his hands behind his back to allow the officer to handcuff him. The defendant confessed that, because his wife and the Department of Human Services had kept his children from him for the past few months, he had killed the four children with an SKS semi-automatic rifle at his uncle's automobile repair garage, Holton's Wrecker Service and Garage. The defendant indicated that the murder weapon and the bodies were still located inside the garage. The officers testified that the defendant appeared normal and calm during this exchange, that he spoke in a matter-of-fact tone, and that he never exhibited any bizarre behavior. One of the officers had been acquainted with the defendant for several years, and as the officers were leaving to investigate his claim, the defendant warned this officer of the "bomb" in the garage. At the garage, the officers discovered an SKS rifle and homemade incendiary devices. The police also located the bodies of the four children stacked underneath a plastic tarpaulin in the rear bay of the garage, the area of the garage where the defendant lived.

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[4]As part of his own custody arrangements, Mr. Rhodes was scheduled to pick up his daughter at the Rutherford County Sheriff's Department that same night.

The defendant gave two statements to the police describing how he had killed his children. According to the defendant, he had contemplated killing the children in 1995 when he was driving them home to their mother following a weekend visit. On that occasion, he had been armed with a "Derringer," but he was unable to harm the children and instead surrendered the children to the police. He explained how, after his former wife obtained an order of protection against him, he had driven by her apartment in Murfreesboro "wanting something to happen," then "they were gone." When Mrs. Holton finally called him to arrange visitation Thanksgiving weekend, he decided to murder the children because they "had been taken away from me and given back to me, taken away from me and given back to me enough."

The defendant described how he had prepared for the killings by hiding his loaded SKS semi-automatic rifle behind a mattress in his living quarters at the garage, locating Mr. Rhodes' home in Spring Hill, and making five incendiary devices out of old oil filters. The defendant recalled that he had planned to kill his children, then travel to Spring Hill and use the incendiary devices to firebomb Mr. Rhodes' residence, and then drive to Murfreesboro and shoot Mr. Rhodes' young daughter, who would be at her mother's apartment in the public housing project in Murfreesboro until the scheduled custody change at the Sheriff's Department. The defendant parked a car next to the back door of his uncle's garage, headed in the direction he would need to travel, so that he could quickly leave the garage after he killed his children and commit the other criminal offenses.

The defendant recalled that, when he had picked up the children, his former wife "was dressed nicely. She was wearing makeup. She said she was happy. And that did not make me happy." After picking up the children at Wal-Mart and taking them to McDonald's and Funland, the defendant brought the children to his uncle's garage, where they visited with him and played with some tools. The defendant noted that he "had to play along to avoid any suspicion on the children's part." Around 7 to 7:30 p.m. the defendant left four-year-old Kayla and six-year-old Eric, who was hearing impaired,

playing in the front bay of the garage with a hammer and other tools so they would be distracted and not hear the shots. The defendant then led twelve-year-old Stephen and ten-year-old Brent to the rear bay where he lived and had earlier hidden the SKS rifle. There he told the two older boys that he "had something for them" and instructed them to close their eyes and stand with their backs to him with Stephen, who was the taller, standing directly in front of Brent. Telling the boys, "don't peek," the defendant pulled out the SKS rifle, knelt down and aimed the rifle. The defendant explained that he positioned the children to enable him to pierce both of their hearts with a single shot. With the barrel of the rifle touching Brent's back, he fired and then shot the boys again to be sure they were dead. After hiding the boys' bodies under a tarpaulin, the defendant brought Kayla and Eric to the rear bay and told them he had "something for them." When the children inquired about their older brothers, the defendant did not respond. Instead he positioned the taller Eric directly in front of Kayla, placed their hands over their eyes, told them not to peek, and knelt and fired the rifle into the two children. The defendant said that he shot Kayla a second time before placing the bodies beside the older children under the tarpaulin. The defendant told the police that there was no enjoyment in killing the children.

The defendant recalled that he then straightened the area, washed, and prepared to complete the next phase of his plan by placing the reloaded rifle and the firebombs in his car. After checking to see if anyone could have seen him at the garage and listening to his police scanner to see if anyone had reported gunshots, he left the garage. However, when it became apparent that there was not enough time to carry out his plan, he returned to the garage. The defendant explained, "I planned a lot of different scenarios and chose the one that time permitted. I was constantly subtracting - going over what ... options...- were left." The defendant further observed, "I had done what I wanted to do. I wanted to shock [my ex-wife] to death. I was done. I was done." After considering suicide, he turned himself in to the police. He explained to the police that he had decided not to kill himself because someone who "was involved" should be left alive to help people "have a chance of understanding this." While professing love

for his children, the defendant told the police that he felt no regret or remorse for killing them.

The defendant's account of the killings was supported by physical evidence. For example, spent bullets and cartridges recovered both from the victims' bodies and from the crime scene had been fired from the SKS rifle found by the police. Gunshot residue was found on the defendant's hands, and the children's blood was found on his clothing. Additionally, the results of the autopsies performed by forensic pathologist Dr. Charles Harlan were consistent with the defendant's story. Dr. Harlan testified that all four children died as a result of multiple gunshot wounds to the chest and/or abdomen. According to Dr. Harlan, the angle of the gunshot wounds was consistent with someone kneeling behind the victims and shooting upwards with the children standing in the positions described by the defendant. Dr. Harlan also opined that some of Kayla's wounds were consistent with someone shooting her from above as she lay on the garage floor.

The defendant declined to testify in his own behalf, but he offered the testimony of several witnesses, with the bulk of the defense proof aimed at establishing the defendant's insanity or diminished capacity and possible carbon monoxide poisoning.[5] The administrator of the Bedford County Jail testified that the defendant was placed on suicide watch during the first week after his arrest. The administrator noted that the defendant had been a quiet and cooperative inmate.

The defendant's uncle, who owned the garage where he killings occurred, testified that the defendant had lived in the rear bay of the garage for the four months preceding the killings. He had slept in an

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[5]The defendant also presented the testimony of his parents' neighbor, who had known the defendant and his family in 1992; of a worker at a Murfreesboro liquor store, who described purchases made by Mrs. Holton; and of a former ATF agent, who opined that the "bomb" found at the garage would not have worked and was made by someone who knew "nothing about how explosives work."

area draped with plastic tarpaulins at the back of the bay and had used a propane heater to warm this enclosed area. The defendant's uncle, who saw the defendant daily, testified that, after he was unable to see his children, the defendant became "quieter and withdrawn, unresponsive" and had less energy. Nonetheless, on the day of the murder the defendant appeared very happy to see his children.

The defendant's uncle recalled that the police returned to the garage following the murders and reconstructed the defendant's living quarters "better and tighter than it originally was" and tested the propane heater inside the enclosed area. The temperature outside on the day of the murders was between forty and fifty degrees Fahrenheit, and the outside temperature was much colder at the time the police reconstructed the living quarters and tested the heater.

Dr. Donna Seger, a toxicologist, testified that carbon monoxide can affect memory, decrease IQ, and cause depression, psychosis and neurologic deficit. Dr. Seger, however, had not examined the defendant. Another witness, Dr. Leighton Sissom, a mechanical engineer who had examined the propane heater and the defendant's living quarters at the garage, testified that the ventilation of the area was inadequate for safe use of the heater and that it was probable that carbon monoxide had been present where the defendant slept. However, Dr. Sissom could not state that the defendant had been exposed to carbon monoxide on or before November 30, 1997, and conceded that the heater, when tested, was functioning properly and did not emit a significant amount of carbon monoxide.

The defendant also introduced the deposition of Dr. Howard S. Kirshner, a neurologist who had tested the defendant for symptoms of carbon monoxide poisoning. Dr. Kirshner described the effects of carbon monoxide poisoning ranging from coma and death to headaches, insomnia, problems with coordination, memory loss, and irritability. According to Dr. Kirshner, the defendant had reported experiencing headaches, irritability, and sluggishness after purchasing the propane heater in October 1997 and had also described memory

loss after the killings. However, except for difficulty with the fine motor coordination tests, the defendant performed normally on the tests administered by Dr. Kirshner. Results of an MRI on the defendant's brain were likewise normal, but Dr. Kirshner explained that changes to the brain caused by carbon monoxide poisoning would not necessarily appear on an MRI scan. Although the defendant's minor coordination problems were consistent with carbon monoxide poisoning, Dr. Kirshner could not diagnose the defendant with carbon monoxide poisoning.

Dr. Pamela Auble, a clinical neuropsychologist, also testified for the defense. She had interviewed and tested the defendant about six months after the offenses. Testing indicated that the defendant's IQ was superior (120) but that he had experienced deficits in processing information, in learning visual information, and in motor speed and manual dexterity. The defendant also experienced difficulty relating to people. Dr. Auble opined that these test results were consistent with exposure to carbon monoxide, although she was unable to definitively conclude that the defendant had been exposed to carbon monoxide. Rather, Dr. Auble opined that at the time these homicides were committed the defendant had been suffering from major depression caused by the termination of his marriage and "his concerns over [the] well-being of his children." Dr. Auble conceded that the defendant had not been depressed, anxious, or psychotic at the time of her June 1998 interview, stating, "at the time I saw him as he said it, really he didn't have to worry about his children anymore and how they were being taken care of. In November of '97 that was a big concern for him." In short, at the time of Dr. Auble's interview, the defendant was "glad [his children] were dead."

Dr. William Kenner, a psychiatrist, testified that the defendant had been suffering from major depression at the time he killed his children. Dr. Kenner explained that a severely depressed parent may believe that his life, as well as that of his children, is worthless, and may kill his children to save them from the "terrible fate" of living. Dr. Kenner opined that the defendant matched the profile of a father who would kill his children, i.e., commit filicide, and emphasized that

"the more a parent loves his or her children, the greater the risk is that they will kill them if they get severely depressed." Dr. Kenner based his opinion that the defendant had been suffering from major depression at the time of these killings upon reports that the defendant had been unable to sleep at night, that he had worked seven days a week except when he saw his children, that he had lost interest in other activities, that he had difficulty thinking and concentrating, that he had spoken slowly and stared into space, that he had lost weight and withdrawn from human contact, and that, in the month before the murder, the defendant had been found lying on the floor for no reason and had expressed a desire to commit suicide. Dr. Kenner believed that the defendant's depression had been exacerbated by carbon monoxide poisoning, which had also made the defendant more irritable. Dr. Kenner, however, conceded that a person can suffer from major depression and still be capable of distinguishing right from wrong. Indeed, Dr. Kenner acknowledged that parents who commit filicide "know it's against the law but [typically believe] it's done for almost the right reasons."

The State's rebuttal proof consisted of the testimony of Ralph Mosley, a safety consultant who had recreated the defendant's living quarters in the rear bay under conditions similar to those existing at the time of the killings in order to test for carbon monoxide contamination. The test revealed no evidence of carbon monoxide.

The State also presented the testimony of Dr. Daniel Martell, a forensic neuropsychologist, who had examined and tested the defendant. Dr. Martell noted that the defendant had a history of depression which was reflected in his medical and military records. Dr. Martell opined that, at the time of the crime, the defendant had been suffering from major depression, passive-aggressive personality disorder, and a schizoid personality. Dr. Martell explained that a person with a passive-aggressive personality disorder acts out anger or hostility in passive ways and that a person with a schizoid personality is a "loner," someone who isolates himself from others and has poor social skills. Dr. Martell dismissed the theory of carbon monoxide poisoning based upon the negative results of the tests

performed by the safety consultant and the results of psychological tests which were entirely consistent with depression alone. As a result of his examination, Dr. Martell concluded that, despite his depression, the defendant knew the nature and the consequences of his behavior and also knew that killing his children was wrong. Dr. Martell stated that the defendant's depression did not preclude premeditation and pointed out that the defendant admitted he had contemplated murdering his children for two years, that the defendant had elaborately planned and prepared for the murders, that the defendant had formulated "a time chart" of how the crimes would be committed, that the defendant had targeted the hearts of the children, wounds certain to cause death, that the defendant had concealed the bodies and the murder weapon from view and washed the blood from his body, and that the defendant had ultimately surrendered to the police, the surrender itself an acknowledgment of wrongdoing. As to Dr. Kenner's testimony that the defendant was motivated by love for his children, Dr. Martell pointed out that the defendant had planned and prepared to shoot Mr. Rhodes' daughter, to whom he was not related, and had intended to fire bomb Mr. Rhodes' home. Dr. Martell concluded that the defendant had been a very angry person, that he had committed these homicides to cause pain for his former wife and her new boyfriend, and that he had been capable of distinguishing right from wrong and of appreciating the wrongfulness of his conduct.

Based upon this proof, the jury found the defendant guilty on all four counts of first degree premeditated murder.

B. Sentencing Phase

At the sentencing hearing the State sought to establish two aggravating circumstances. With respect to all four convictions, the State relied upon the "mass murder" aggravating circumstance, "which is defined as the murder of three (3) or more persons whether committed during a single episode or at different times within a forty-eight-month period." Tenn. Code Ann. § 39-13- 204(i)(12) (1997). With respect to the killings of ten-year-old Brent, six-year-old Eric, and four-year-old Kayla Marie, the State sought to establish that "the murder was committed against a person less than twelve (12) years of

age and the defendant was eighteen (18) years of age, or older." Tenn. Code Ann. § 39-13-204(i)(1) (1997).

The State relied upon the proof presented during the guilt phase of the trial. The State also replayed the audiotape of the defendant's November 30, 1997, confession that contained his date of birth and re-introduced the February 27, 1996, custody order of the Bedford County Juvenile Court that established the ages of the children.

Pursuant to the defendant's instructions, the mitigation proof was limited to testimony by the jail administrator that the defendant had been a good prisoner, that he had obeyed the rules, performed assigned tasks well, and interacted well with the prison staff. The administrator testified that the defendant was kept in isolation but was regularly visited by his family. The defendant did not dispute the applicability of the aggravating circumstances but instead argued that the aggravating circumstances did not outweigh the following mitigating circumstances beyond a reasonable doubt: (1) the defendant has no significant history of prior criminal activity; (2) the murder was committed while the appellant was under the influence of extreme mental or emotional disturbance; (3) the murder was committed under circumstances that the appellant reasonably believed to provide a moral justification for his conduct; (4) the capacity of the appellant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of a mental disease or defect that was insufficient to establish a defense to the crime but substantially affected his judgment; and (5) any other mitigating circumstance raised by either the prosecution or the defense during both the guilt/innocence phase fo the trial and the sentencing phase. *See* Tenn. Code Ann. § 39-13-204(j) (1997).

Based upon this proof, the jury imposed a sentence of death for each conviction. The defendant appealed, challenging both his convictions and sentences. The Court of Criminal Appeals affirmed, and the case was docketed in this Court. We affirm.

II. Sufficiency of the Evidence

The defendant first challenges the sufficiency of the convicting evidence. Specifically the defendant argues that the evidence is insufficient to support the jury's finding of premeditation because he had been suffering from severe depression at the time of the killings that prevented the exercise of reflection and judgment. The defendant declares that "[t]here is no way that a person with the defendant's past record, including giving up a military career for his children, could kill them after the exercise of reflection and judgment."

The defendant was convicted of four counts of first degree murder–"[a] premeditated and intentional killing of another." Tenn. Code Ann. § 39-13-202(a)(1)(1997). Intentional "refers to a person who acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result." Tenn. Code Ann. § 39-11-302(a)(1997). A killing is premeditated if it

> is an act done after the exercise of reflection and judgment. "Premeditation" means that the intent to kill must have been formed prior to the act itself. It is not necessary that the purpose to kill pre-exist in the mind of the accused for any definite period of time. The mental state of the accused at the time the accused allegedly decided to kill must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion as to be capable of premeditation.

Tenn. Code Ann. § 39-13-202(d)(1997).

The proper inquiry for an appellate court reviewing a sufficiency challenge is whether, considering the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See* Tenn. R. App. P. 13(e); *Jackson v. Virginia*. 443 U.S. 307 (1979):

State v. Hall, 8 S.W.3d 593, 599 (Tenn. 1999). A verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, and on appeal the defendant has the burden of illustrating why the evidence is insufficient to support the verdict rendered by the jury. *State v. Carruthers*, 35 S.W.3d at 557-58 (Tenn. 2000); *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn.1982). In contrast, the State on appeal is entitled to the strongest legitimate view of the trial evidence and all reasonable inferences which may be drawn from the evidence. *See Carruthers*, 35 S.W.3d at 557-58; *Hall*, 8 S.W.3d at 599. Questions about the credibility of witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, and this Court does not re-weigh or re-evaluate the evidence. *Id.* Nor may this Court substitute inferences it draws from circumstantial evidence for those drawn by the trier of fact. *See Carruthers*, 35 S.W.3d at 557-58; *Liakas v. State*, 199 Tenn. 298, 305, 286 S.W.2d 856, 859 (1956). The standard of appellate review is the same whether the conviction is based upon direct or circumstantial evidence. *State v. Vann*, 976 S.W.2d 93, 111 (Tenn.1998). Finally, Tennessee courts have identified several circumstances that may be considered indicative of premeditation, including: the use of a deadly weapon upon an unarmed victim; the particular cruelty of the killing; declarations by the defendant of an intent to kill; evidence of procurement of a weapon; preparations before the killing for concealment of the crime, and calmness immediately after the killing. *State v. Bland*, 958 S.W.2d 651, 660 (Tenn.1997): *see also State v. Dellinger*, 79 S.W.3d 458, 492 (Tenn.2002).

Evaluating the proof in this record in accordance with these standards we hold that the evidence clearly is sufficient to support the defendant's convictions. The proof has been thoroughly reviewed and need not be again recounted in detail. To summarize, however, the record reflects that the defendant admitted that he had contemplated and planned to murder his four young children. Indeed, the defendant told the police that he had been thinking about killing his children for two years. The defendant explained that he definitively resolved to kill his children after speaking with his former wife *two days* before the killings occurred. The record reflects that the defendant formulated

the plan, that he concealed the loaded gun at the garage, that he called his former wife to let her know that he would be taking the children by the garage on the pretense of showing them a dog, that he lured the children, two at a time, to the rear bay of the garage promising them a surprise, that he positioned the children so that one shot would pierce the hearts of both, that he gave the two younger children a drill and a hammer to play with so they would be distracted and not hear their brothers being shot, that he concealed the bodies of his older sons before persuading the two younger children to come to the rear bay of the garage, and that by killing the children he intended to "shock" his ex-wife "to death" and to end the custody disputes, explaining that his children had been "had been taken away from me and given back to me, taken away from me and given back to me enough." The defendant also concealed the victim's bodies and "squared away" the crime scene, prepared and planned to commit other related crimes by locating the residence of his former wife, by constructing homemade incendiary devices to firebomb that residence, and by parking a vehicle in a way that would facilitate his ability to commit all the crimes he had planned.

While all the mental health experts testified that the defendant had been suffering from depression at the time he killed his children, none testified that the depression rendered him incapable of premeditation, of distinguishing right from wrong, or of appreciating the wrongfulness of his conduct. To the contrary, Dr. Martell opined that the defendant had been capable of forming the requisite mental intent for premeditated first degree murder and of distinguishing right from wrong and of appreciating the wrongfulness of his conduct. Dr. Auble agreed that the defendant had been capable of appreciating the wrongfulness of his conduct and of distinguishing right from wrong. Furthermore, she conceded that the defendant had not been depressed when she interviewed him some months after the killings because he no longer had to worry about his children and that he was "glad [his children] were dead." Finally, by explaining that he had killed his children to end the custody dispute and to shock his former wife, the defendant himself contradicted Dr. Kenner's opinion that the killings were altruistic. Furthermore, the defendant's behavior immediately after the killings indicate that he was able to distinguish right from

wrong and to appreciate the wrongfulness of his conduct. Before leaving the garage after the killings, the defendant listened to the police scanner in his car to determine whether anyone had reported hearing gunshots. The defendant later surrendered to police, walking into the sheriff's department and reporting a "homicide times four." Officers testified that the defendant appeared normal and calm, spoke in a matter-of-fact tone, and never exhibited any bizarre behavior. Indeed, the defendant warned one of the officers, whom he had known for several years, of the homemade incendiary devices in the garage. In sum, there is sufficient, indeed overwhelming, evidence in the record to support the jury's verdict finding the defendant guilty of four counts of premeditated first degree murder. This issue is without merit.

III. Constitutionality of Insanity Defense

The defendant next argues that, as applied in the narrow context of a premeditated first degree murder case, the statutory insanity defense. Tennessee Code Annotated section 39-11-501, violates a criminal defendant's constitutional right to due process. According to the defendant, to prove premeditation, which requires the exercise of reflection and judgment, the prosecution must prove sanity. The defendant therefore contends that the statute requiring the defense to prove insanity by clear and convincing evidence is unconstitutional in a premeditated first degree murder case because it shifts the burden of proof for an essential element of the offense from the State to the defense. We disagree.

> Analysis of this issue begins with the challenged statute, which provides as follows: (a) It is an affirmative defense to prosecution that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature or wrongfulness of such defendant's acts. Mental disease or defect does not otherwise constitute a defense. *The defendant has the burden of proving the defense of insanity by clear and convincing evidence.*

(b) As used in this section, "mental disease or defect" does not include any abnormality manifested only by repeated criminal or otherwise antisocial conduct.

(c) No expert witness may testify as to whether the defendant was or was not insane as set forth in subsection (a). Such ultimate issue is a matter for the trier of fact alone.

Tenn. Code Ann. § 39-11-501 (1997). Under this statute, insanity is an affirmative defense; sanity is not an element of the offense of first degree murder. *State v. Flake*, 88 S.W.3d 540, 551 (Tenn. 2002). This is important because the United States Supreme Court has upheld the constitutionality of statutes that require a criminal defendant to prove the affirmative defense of insanity beyond a reasonable doubt. *Leland v. Oregon*, 343 U.S. 790, 791-93 (1952). It is logical to conclude that statutes requiring a criminal defendant to prove the affirmative defense of insanity by clear and convincing evidence also are constitutional. *See, e.g., United States v. Amos*, 803 F.2d 419, 421 (8th Cir.1986)("The Supreme Court in *Leland* . . . held that a criminal defendant may, consistent with due process, be required to prove his [in]sanity beyond a reasonable doubt. It is axiomatic, therefore, that a lesser standard of proof, such as the clear and convincing standard, be imposed.")

Since *Leland*, the Supreme Court has clarified that placing the burden of proving an affirmative defense upon a criminal defendant will be unconstitutional only if proving the affirmative defense necessarily negates an essential element of the offense. *See, e.g., Patterson v. New York*, 432 U.S. 197, 206-07 (1997). Applying this standard, the Court of Criminal Appeals has in a second degree murder case upheld the constitutionality of the statutory insanity defense in Tennessee. *State v. Perry*, 13 S.W.3d 724, 739 (Tenn. Crim. App.1999). We reach the same result in this case. Proving insanity does not *necessarily* negate the element of premeditation. It is possible for a criminal defendant to commit a premeditated murder after the exercise of reflection and judgment but not be capable of

appreciating the wrongfulness of the act. For example, an insane criminal defendant could be acting under the delusion that by committing the murder he or she will be fulfilling his or her duties as a law enforcement officer. The statutory insanity defense does not unconstitutionally shift the burden of proof to the defendant to negate an essential element of the offense of first degree murder. This issue is without merit.

IV. Residual Doubt

In what is another attack on the strength of the evidence, the defendant argues that there is significant residual doubt concerning his mental state at the time of the killings and therefore his guilt of the offenses of first degree murder. The defendant argues that this "residual doubt" proof renders the death sentences "inappropriate" and warrants imposition of life sentences. We disagree.

"'Residual doubt evidence,' in general, may consist of proof admitted during the sentencing phase that indicates the defendant did not commit the offense, notwithstanding the jury's verdict following the guilt phase." *State v. McKinney*, 74 S.W.3d 291, 307 (Tenn.2002) (citing *State v. Hartman*, 42 S.W.3d 44, 55-56 (Tenn. 2001)). A defendant may "present evidence at a re-sentencing hearing to establish residual doubt as a nonstatutory mitigating circumstance." *Hartman*, 42 S.W.3d at 55. Indeed, under Tennessee law, a defendant "has the right to present at the sentencing hearing, whether by the jury which heard the guilt phase or by a jury on re-sentencing, evidence relating to the circumstances of the crime or the aggravating or mitigating circumstances, including evidence which may mitigate his culpability." *Hartman*, 42 S.W.3d at 56 (quoting *State v. Teague*, 897 S.W.2d 248, 256 (Tenn.1995)).

Like *McKinney* however, this case is not controlled by either *Hartman* or *Teague*. In *Hartman*, the defendant sought to introduce at a re-sentencing hearing evidence that the prosecutor had purchased

the testimony of a key witness at the original trial. 42 S.W.3d at 55. In *Teague*, the defendant tried to introduce alibi evidence at a re-sentencing proceeding. 897 S.W.2d at 256. The present case does not involve a re-sentencing procedure, nor does it involve a trial court erroneously precluding a defendant from introducing residual doubt evidence or from making an argument based upon residual doubt. Here, the defendant introduced evidence during the guilt phase of the trial regarding his mental state at the time of the killings, and the trial court properly allowed the defendant to refer to this evidence in argument before the same jury at the sentencing phase of the trial. *McKinney*, 74 S.W.3d at 308 ("[W]here a defendant seeks to argue residual doubt based on the evidence introduced or in response to an argument made by the prosecution, the trial court should exercise its discretion by resolving any doubt in favor of the defendant's argument.") by imposing the death sentence, the jury simply resolved any "residual doubts" concerning the defendant's mental state at the time of the killings in favor of the State. As previously explained, the evidence is sufficient to support the jury's finding as to premeditation.

Nonetheless, in assessing this residual doubt claim and in assessing whether the evidence supports the jury's finding that aggravating circumstances outweighed mitigating circumstances beyond a reasonable doubt, defense counsel urges this Court to consider the defendant's refusal to allow counsel to present extensive mitigating evidence concerning his relationship with his former wife and children. We decline. As the Court of Criminal Appeals recognized, "abundant evidence" was presented during the guilt phase regarding Mrs. Holton's inadequacies as a mother and the defendant's loving relationship with his children. "[G]iven that this was not a re-sentencing hearing, the reality is that the sentencing jury had already heard the testimony . . . and had reconciled it in favor of the State's theory of guilt and against the defendant's theory of innocence." *McKinney*, 74 S.W.3d at 308. Furthermore, a criminal defendant has the right and the authority to make substantive decisions concerning the presentation of his or her defense, including the right to forego the presentation of mitigating evidence during the sentencing phase of a capital trial. *Zagorski v. State*, 983 S.W.2d 654, 658 (Tenn.1998). Defense counsel and the trial court complied with *Zagorski* and

insured that the defendant's decision was voluntary, knowing and intelligent. A defendant's subsequent regret or doubt about the wisdom of foregoing the presentation of mitigating evidence is not a basis for relief. *Id.* at 658-59. This issue is without merit.

V. Constitutionality of the Capital Sentencing Statutes: *Apprendi* and *Ring*

The defendant next claims that Tennessee's capital sentencing scheme is unconstitutional under *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Ring v. Arizona*, 536 U.S. 584 (2002). In support of this claim, the defendant makes four arguments: (1) the statute does not mandate that aggravating circumstances be charged in the indictment; (2) the statute mandates that appellate judges, not jurors, conduct comparative proportionality review; (3) the statute does not include a "scale" for determining whether aggravating circumstances outweigh mitigating circumstances; and (4) the statute does not require that the prosecution prove sanity beyond a reasonable doubt. As the State points out, because the defendant failed to raise these arguments in the Court of Criminal Appeals, waiver could be applied. Nonetheless, we will consider the defendant's arguments in turn and explain why none has merit.

First, the defendant contends that the failure to include aggravating circumstances in the indictment violates the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution as well as Article I, section 14 of the Tennessee Constitution. The defendant recognizes that this Court recently rejected this argument, stating, "[n]either the United States Constitution nor the Tennessee Constitution requires that the State charge in the indictment the aggravating factors to be relied upon by the State during sentencing in a first degree murder prosecution." *See State v. Dellinger*, 79 S.W.3d 458, 467 (Tenn. 2002). The defendant, however, argues that *Dellinger* is incorrect in light of the United States Supreme Court's later decision in *Ring*, which extended the principles of *Apprendi* to capital sentencing and required that aggravating circumstances, as the

functional equivalents of elements, be found by a jury beyond a reasonable doubt.

In *Apprendi* the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. This Court explained in *Dellinger* that the capital sentencing scheme in Tennessee is consistent with *Apprendi* because: (1) the holding in *Apprendi* applies only to enhancement factors used to impose a sentence above the statutory maximum; (2) the death penalty is within the statutory range of punishment prescribed for first degree murder by the Tennessee General Assembly; and (3) Tennessee's capital sentencing procedure requires both that a jury find statutory aggravating circumstances based upon proof beyond a reasonable doubt and that the aggravating circumstances outweigh mitigating circumstances beyond a reasonable doubt. *Dellinger*, 79 S.W.3d at 466-67.

After the release of our opinion in *Dellinger*, the United States Supreme Court issued its opinion in *Ring*. The narrow question presented in *Ring* was "whether [an] aggravating factor may be found by the judge, as Arizona law specifies, or whether the Sixth Amendment's jury trial guarantee, made applicable to the States by the Fourteenth Amendment, requires that the aggravating factor determination be entrusted to the jury." 536 U.S. at 597. The Court in *Ring* pointed out the limited nature of the issue, noting that of the thirty-eight states with capital punishment, twenty-nine, including Tennessee, "commit sentencing decisions to juries." *Id.* at 608 n. 6. Contrary to the defendant's assertions, *Ring* does not stand for the broad proposition that aggravating circumstances must be charged in the indictment to satisfy constitutional standards. *See United States v. Bernard*, 299 F.3d 467, 488 (5th Cir.2002) ("*Ring* did not hold that indictments in capital cases must allege aggravating and mental state factors."); *Porter v. Crosby*, 840 So.2d 981, 986 (Fla.2003)(stating that neither *Apprendi* nor *Ring* require aggravating circumstances be alleged in the indictment); *Terrell v. State*, 572 S.E.2d 595, 602 (Ga.

2002) (same). Therefore, *Ring* provides no relief to the defendant and does not invalidate this Court's holding in *Dellinger*. *See State v. Carter*, 114 S.W.3d 895, 910 n.4 (Tenn. 2003) (applying *Dellinger* to reject a claim that *Ring* requires aggravating circumstances be included in the indictment).

Next the defendant contends that under *Apprendi* and *Ring*, Tennessee's capital sentencing scheme violates the Sixth Amendment to the United States Constitution because the statute does not require the question of comparative proportionality to be decided by a jury upon proof beyond a reasonable doubt. We disagree.

The holdings of *Apprendi* and *Ring* are summed up by the following language from *Ring*: "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." *Ring*, 536 U.S. at 602. Statutory comparative proportionality review is not a fact upon which "an increase in the defendant's authorized punishment" is contingent. Appellate courts conducting statutory comparative proportionality review determine whether "the case, taken as a whole, is plainly lacking in circumstances consistent with those in similar cases in which the death penalty has been imposed." *State v. Godsey*, 60 S.W.3d 759, 782 (Tenn. 2001); *State v. Bland*, 958 S.W.2d 651, 665 (Tenn.1996). If the case is found to be disproportionate under this standard, the sentence is reduced to life imprisonment or life imprisonment without the possibility of parole. *See* Tenn. Code Ann. § 39-13-206(d)(2)(1997): *Godsey*, 60 S.W.3d at 793. Therefore, appellant courts conducting comparative proportionality review have only two options – reduce the sentence of death or affirm the sentence of death imposed by the jury. Appellate judges do not find facts that increase the defendant's authorized punishment. Indeed, comparative proportionality review becomes relevant only after a jury has imposed the maximum sentence – death. Thus, allowing appellate judges to conduct statutory comparative proportionality review does not violate the holding of *Apprendi* and *Ring*. *See Morrison v. State*, 583 S.E.2d 873, 879 (2003)(rejecting the defendant's argument that a statute

allowing appellate judges to perform comparative proportionality review violates *Apprendi* and *Ring*).

Furthermore, this Court has previously rejected the defendant's next contention, that the capital sentencing statute fails to provide sufficient guidance and direction to the jury as to the weighing process. *See, e.g., State v. Smith*, 857 S.W.2d 1, 21-22 (Tenn.1993). Despite the defendant's contentions to the contrary, neither *Apprendi* nor *Ring* directly address this issue. The capital sentencing statute in Tennessee is consistent with these decisions in that it allows imposition of a death sentence only when a *jury* determines the existence of aggravating circumstances and that these aggravating circumstances outweigh mitigating circumstances *beyond a reasonable doubt*. *See* Tenn. Code Ann. § 39-13-204(g)(1)(1997)(emphasis added). This process is entirely consistent with *Apprendi* and *Ring*.

Also instructive is the following analysis of the Nebraska Supreme Court as to whether *Apprendi* and *Ring* preclude appellate comparative proportionality or require precise standards as to weighing aggravating versus mitigating circumstances:

> [W]e understand *Ring* as recognizing a Sixth Amendment right to a jury determination of the existence of aggravating circumstances which determine "death eligibility," because in the absence of at least one such circumstance, the death penalty cannot be imposed. It is the determination of "death eligibility" which exposes the defendant to greater punishment, and such exposure triggers the Sixth Amendment right to the jury determination as delineated in *Apprendi* and *Ring*. In contrast, the determination of mitigating circumstances, the balancing of aggravating circumstances against mitigating circumstances, and proportionality review are part of the "selection decision" in capital sentencing, which, under the current and prior statutes, occurs only after eligibility has been determined. These determinations cannot increase the

> potential punishment to which a defendant is exposed as a consequence of the eligibility determination. Accordingly, we do not read either *Apprendi* or *Ring* to require that the determination of mitigating circumstances, the balancing function, or proportionality review be undertaken by a jury.

State v. Gales, 265 Neb. 658 N.W.2d 604, 626-27 (2003)(citation omitted). This reasoning is compelling and is fully applicable to Tennessee's capital sentencing scheme. Thus, the defendant's contentions that the capital sentencing statute is unconstitutional because it permits judges rather than jurors to conduct proportionality review and fails to provide a scale for determining whether aggravating circumstances outweigh mitigating circumstances are without merit.

Likewise without merit is the defendant's assertion that the statutory insanity defense, Tennessee Code Annotated section 39-11-501, which requires the defendant to prove insanity by clear and convincing evidence, is unconstitutional under *Apprendi* and *Ring*. For the second time, the defendant contends that the statute is unconstitutional because it does not require the prosecution to prove sanity to a jury beyond a reasonable doubt. Again, we must disagree. Insanity is an affirmative defense, not a fact that, if found, increases a defendant's authorized punishment. *Flake*, 88 S.W.3d at 551. Therefore, requiring a defendant to prove insanity, an affirmative defense analogous to a mitigating circumstance, does not violate *Apprendi* or *Ring*.

VI. Mandatory Review

Tennessee Code Annotated § 39-13-206(c)(1)(1997) mandates that this Court determine (1) whether the sentence of death was imposed in any arbitrary fashion; (2) whether the evidence supports the jury's finding of statutory aggravating circumstances; (3) whether the

evidence supports the jury's finding that aggravating circumstances outweigh any mitigating circumstances; and (4) whether the sentence of death is excessive ir disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant.

A thorough review of the record reveals that the evidence is sufficient to support the jury's finding of the aggravating circumstances beyond a reasonable doubt. As to all four convictions of first degree murder, the jury found that the defendant had committed "mass murder," "which is defined as the murder of three (3) or more persons whether committed during a single episode or at different times within a forty-eight-month period." Tenn. Code Ann. § 39-13-204(i)(12)(1997). As to three of the convictions, the jury found that "the murder was committed against a person less than twelve (12) years of age and the defendant was eighteen (18) years of age, or older." Tenn. Code Ann. § 39-13-204(i)(1)(1997). The defendant did not contest the applicability of these aggravating circumstances, both of which involve objective, readily ascertainable facts. Furthermore, the evidence is sufficient to support the jury's findings that the aggravating circumstances so found outweighed mitigating circumstances beyond a reasonable doubt. Additionally, there is no indication that the sentences of death were imposed in an arbitrary fashion.

Finally, the sentences of death in this case are not disproportionate to the penalty imposed in similar cases, considering the nature of the crime and the defendant. Tenn. Code Ann. § 39-13-204(c)(1)(D)(1997). A death sentence is disproportionate only if "the case, taken as a whole, is plainly lacking in circumstances consistent with those in similar cases in which the death penalty has been imposed." *Bland*, 958 S.W.2d at 665. A death sentence is not disproportionate merely because the circumstances of the offense are similar to those of another offense for which the defendant has received a life sentence. *Id.* Thus, the duty of an appellate court is not to assure "that a sentence less than death was never imposed in a

case with similar characteristics," but instead to "assure that no aberrant death sentence is affirmed." *Id.*

While there is no mathematical or scientific formula involved in comparing similar cases, this Court generally considers: (1) the means of death; (2) the manner of death; (3) the motivation for the killing; (4) the place of death; (5) the similarity of the victim's circumstances, including age, physical and mental conditions, and the victim's treatment during the killing; (6) the absence or presence of provocation; (7) the absence or presence of justification; and (8) the injury to and effects on non-decendent victims. *See Vann*, 976 S.W.2d at 107 (citing *Bland*, 958 S.W.2d at 667). When reviewing the characteristics of the defendant, we consider: (1) the defendant's prior record or prior criminal activity; (2) the defendant's age, race, and gender; (3) the defendant's mental, emotional or physical condition; (4) the defendant's involvement or role in the murder; (5) the defendant's cooperation with authorities; (6) the defendant's remorse; (7) the defendant's knowledge of the helplessness of the victim; and (8) the defendant's capacity for rehabilitation. *Id.* Moreover in conducting this review, "we select from the pool of cases in which a capital sentencing hearing was actually conducted to determine whether the sentence should be life imprisonment, life imprisonment without the possibility of parole, or death." *Carruthers*. 35 S.W.3d at 570 (citing *Bland*, 958 S.W.2d at 666).

Considering the record in this case in light of these factors, the proof shows that the thirty-six-year-old, highly intelligent white male defendant meticulously planned and carefully premeditated the murders of his four young children. The defendant admitted that his motivation was anger at his former wife for removing the children from his custody and his desire to "shock" his former wife "to death." To accomplish these murders, the defendant exploited the trust and love of his children. He agreed to visit with them and take them Christmas shopping. He enticed them to the back bay of the garage on the pretense that he had a surprise for them, and used this pretense to carefully position the children so that one shot would pierce two hearts. To fully ensure their death, the defendant repeatedly shot the

unarmed, unresisting children at close range with an SKS semi-automatic rifle. While the mental health experts agreed that the defendant had been depressed at the time he committed these crimes, there was no evidence indicating that he was incapable of distinguishing right from wrong or of appreciating the wrongfulness of his conduct. Instead, the proof indicated that he methodically devised a plan and carefully carried it out against the vulnerable, unsuspecting victims, all the while realizing the consequences of his actions. While the defendant told police he took no enjoyment from committing these murders, he certainly expressed no remorse for his actions, telling Dr. Auble several months later that he was "glad [his children] were dead." Dr. Auble testified that the defendant had not been suffering from depression when he made that comment. While there is not evidence in the record regarding the defendant's amenability to rehabilitation, the record reflects that the defendant had cooperated with the police, confessing to the crimes and warning officers about the homemade incendiary devices. Furthermore, the jail administrator testified that the defendant had caused no problems during his incarceration. While no two capital cases and no two defendants are alike, the following cases and defendants share several similarities with this case and this defendant.

In *State v. Black*, 815 S.W.2d 166 (Tenn.1991), the defendant shot and killed his girlfriend and her two daughters, nine and six years old. The defendant was motivated by his anger at his girlfriend's attempt to reconcile with her ex-husband, the father of her children. The defendant had a prior conviction involving a shooting and was on a weekend furlough from the Metropolitan Workhouse in Davidson County when he committed these murders. The defendant denied any involvement in the murders, but he was convicted of first degree premeditated murder as to each victim. The defendant presented the testimony of former teachers, friends, and family members in mitigation. This testimony portrayed the defendant as a good student, a good father, a good provider, a good inmate, a responsible, polite, friendly, helpful, and nonviolent person who had experienced a religious conversion while incarcerated. Nevertheless, the jury imposed a death sentence for the murder of the six-year-old child and sentences of life imprisonment on the remaining convictions. In

imposing the death sentence, the jury relied upon five aggravating circumstances, including the young age of the victim and the defendant's commission of mass murder. *See* Tenn. Code Ann. § 39-13-204(i)(1), (2), (5), (6), (7), (12)(1989).

In *State v. Oscar Franklin Smith*, 868 S.W.2d 561 (Tenn. 1993), the jury imposed the death sentence upon the forty-year-old defendant who shot and stabbed his estranged wife and his thirteen-and sixteen-year-old stepsons. The murders were motivated by the defendant's anger at being separated from his wife. The defendant had previously assaulted the victims and, as a result, was facing charges for aggravated assault at the time he committed the murders. Witnesses testified that for several months prior to the murder, the defendant had publicly plotted to kill the victims. Expert testimony revealed that he mutilated two of the bodies shortly after the victims' deaths. The defendant denied his involvement in the murders. Nevertheless, the jury found him guilty of first degree premeditated murder as to each victim and imposed a sentence of death for each murder, finding that the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind, that the murder was committed for the purpose of avoiding arrest or prosecution, that the murders were committed during the perpetration of another felony, and that the defendant had committed mass murder. *See* Tenn. Code Ann. § 39-13-204(i)(5), (6), (7), (12)(1989).

In *State v. Keen*, 31 S.W.3d 196 (Tenn. 2000), the twenty-seven-year-old defendant was convicted of first degree murder during the perpetration of a rape of his girlfriend's eight-year-old daughter. In sentencing the defendant, the jury applied two aggravating circumstances, including the young age of the victim, and the fact that the murder was especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death. *Id.* at 205: *see* Tenn. Code Ann. § 39-13-204(i)(1),(5)(1989). The evidence established that the defendant raped the child while choking her, possibly with a shoelace. *Id.* at 203-04. When the child stopped breathing, the defendant threw her into a river. *Id.* at 203. An autopsy revealed multiple scrapes and

bruises to the child's face and neck and a deep ligature mark around the front of her neck. *Id.* at 204. The autopsy further indicated that the child was alive when she was thrown into the river. *Id.* The defendant was highly intelligent but was suffering from attention deficit disorder, post-traumatic stress disorder, and serious depression. *Id.* Additionally, the defendant had been sexually abused as a child. *Id.* at 205. The defendant had no prior criminal record and demonstrated remorse following the offense. *Id.* at 221.

In *State v. Vann*, 976 S.W.2d 93 (Tenn.1998), the defendant was convicted of felony murder during the perpetration of a rape of his eight-year-old daughter. The proof indicated that the victim's death was the result of ligature strangulation. The jury applied three aggravating circumstances in the sentencing the defendant to death: the young age of the victim, the defendants prior convictions for aggravated rape, and the fact that the murder was especially heinous, atrocious or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death. *See* Tenn. Code Ann. § 39-13-204(i)(1), (2), (5) (1997). Medical testimony indicated that the condition of the victim's anus was consistent with ongoing, repeated anal penetration. Witnesses testified that the defendant showed no remorse at the hospital about his daughter's death, and nothing in the record indicated a capacity for rehabilitation.

In *State v. Irick*, 762 S.W.2d 121 (Tenn.1988), the twenty-six-year-old defendant was babysitting a friend's children, including the victim. The defendant raped the seven-year-old victim vaginally and anally. The victim suffocated as the defendant held his hand over her mouth to keep her from screaming. The defendant was convicted by a jury of first degree felony murder and aggravated rape. Following a sentencing hearing, the jury found four aggravating circumstances: the victim was less than twelve years of age; the murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind; the murder was committed for the purpose of avoiding interfering with, or preventing a lawful arrest or prosecution of the defendant or another; and the murder was committed during the perpetration of a felony. *See* Tenn. Code Ann. § 39-2-

203(i)(1),(5),(6),(7)(1982). The defendant had offered mitigating evidence that he had been under the influence of marijuana or alcohol at the time he committed the offense, and that he had a past mental impairment.

In *State v. Coe*, 665 S.W.2d 903 (Tenn.1983), the defendant was a stranger to the eight-year-old victim. Hew lured her into his car, drove to an isolated spot, and raped her. When Coe completed the rape, the victim told him that Jesus loved him. At that point, the defendant strangled the victim until she turned blue. When the victim did not immediately die from the strangulation, he stabbed her in the neck with a pocket knife and watched as she suffered agonizing death throes. Eventually, he left her to die in the wooded area. Coe was convicted of first degree murder, kidnaping, and aggravated rape. Following the sentencing hearing the jury sentenced the defendant to death upon finding four aggravating circumstances: the victim was not twelve years of age; the murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind; the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another; and the murder was committed while the defendant was engaged in committing or attempting to commit rape. *See* Tenn. Code Ann. § 39-2-203(i)(1), (5), (6), (7) (1982). As mitigating evidence the defendant claimed that he had been under the influence of extreme mental or emotional disturbance at the time he committed the offense.

In *State v. Payne*, 791 S.W.2d 10 (Tenn.1990), the twenty-year-old defendant stabbed to death his girlfriend's twenty-eight-year-old neighbor and the neighbor's two-year-old daughter. The jury imposed the death penalty for each conviction, and as to the two-year-old child, relied upon the age of the victim, the fact that the defendant knowingly created a great risk of death to two or more persons other than the victim, and that the murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind. Tenn. Code Ann. § 39-2-203(i)(1), (3), & (5) (1982): *see also State v. Carruthers*, 35 S.W.3d 516 (Tenn. 2000) (imposing the death sentence based in part on the mass murder aggravating circumstance where the defendants

shot two men, strangled the mother of one of the men, and buried all three victims alive).

Like the present case, the defendant in each of these cases murdered a minor, indeed in many instances a very young child. In most of these cases, as in this case, the victim was either well-acquainted with the defendant or related to the defendant. In many of these cases, the jury relied upon the age of the victim aggravating circumstance, and in two cases, the jury relied upon the mass murder aggravating circumstance. Unlike the present case, in many of these cases the defendants denied involvement in the crime and presented extensive mitigating proof. While no two capital cases are identical, we have compared the circumstances of the present case with the circumstances of the cases set out above and other not herein detailed and conclude that this case, taken as a whole, is not plainly lacking in circumstances consistent with other similar cases in which the death penalty has been imposed. Thus, the defendant's sentences of death are not disproportionate considering the circumstances of the crime and the defendant.

VII. Conclusion

We have considered the entire record in this case and find that the sentences of death were not imposed in any arbitrary fashion, that the sentences of death are not excessive or disproportionate, that the evidence supports the jury's finding of the statutory aggravating circumstances and the jury's finding that these aggravating circumstances outweigh mitigating factors beyond a reasonable doubt. We have also considered all the defendant's assignments of error and conclude that none has merit. With respect to issues not specifically addressed herein, we affirm the decision of the court of Criminal Appeals, authored by Judge Norma McGee Ogle and joined in by Judge David H. Welles and Judge Jerry L. Smith. Relevant portions of that opinion are published hereafter as an appendix. The defendant's convictions and sentences are affirmed. The sentences of death shall be carried out as provided by the law on the 3rd day of

June, 2004, unless otherwise ordered by this Court or other proper authority. It appearing that the defendant is indigent, costs of this appeal are taxed to the State of Tennessee.

FRANK F. DROWOTA, III
CHIEF JUSTICE

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

October 3, 2003 Session

Heard at Murfreesboro[1]

STATE OF TENNESSEE v. DARYL KEITH HOLTON

Direct Appeal from the court of Criminal Appeals

Circuit Court for Bedford County

No. 14302 William Charles Lee, Judge

No. M2000-00766-SC-DDT-DD - Filed January 5, 2004

ADOLPHO A. BIRCH, JR., J., concurring and dissenting.

I concur in the conclusion of the majority that Holton's convictions should be affirmed. As to the sentence of death, however, I continue to adhere to my views expressed in a long line of dissents beginning with *State v. Charmers*, 28 SW.3d 913, 920-25 (Tenn. 2000) (Birch, J., concurring and dissenting), and most recently elaborated on in *State v. Davidson*, ___ S.W.3d ___, (Tenn. Oct. 20, 2003) (Birch, J., dissenting), that the comparative proportionality review protocol currently embraced by the majority is inadequate to

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[1]This case was heard as part of the October 3, 2003, S.C.A.L.E.S. (Supreme Court Advancing Legal Education for Students) project in Murfreesboro, Rutherford County, Tennessee.

shield defendants from the arbitrary and disproportionate imposition of the death penalty. *See* Tenn. Code Ann. § 39-13-206(c)(1)(D)(1995 Supp.). I have repeatedly expressed my displeasure with the current protocol since the time of its adoption in *State v. Bland*, 958 S.W.2d 651 (Tenn. 1997). I believe there are three basic problems with the current proportionality analysis: (1) the proportionality test is overbroad,[2] (2) the pool of cases used for comparison is inadequate,[3] and (3) review is too subjective.[4] I have previously discussed, in depth, my perception that these flaws undermine the reliability of the current proportionality protocol. *See, e.g., Godsey*, 60 S.W.3d at 793-800 (Birch, J., concurring and dissenting). Accordingly, I respectfully dissent from that portion of the majority opinion affirming the imposition of the death penalty in this case.

ADOLPHO A. BIRCH, JR., JUSTICE

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[2]I have urged adopting a protocol in which each case would be compared to factually similar cases in which *either* a life sentence or capital punishment was imposed to determine whether the case is more consistent with "life" cases or "death" cases. *See State v. McKinney*, 74 S.W.3d 291, 321 (Tenn. 2002) (Birch. J., concurring and dissenting). The current protocol allows a finding proportionality if the case is similar to existing *death penalty* cases. In other words, a case is disproportionate only if the case under review "is plainly lacking in circumstances consistent with those in similar cases in which the *death penalty* has been imposed." *Bland*, 958 S.W.2d at 665 (emphasis added).

[3]In my view, excluding from comparison that group of cases in which the State did not seek the death penalty, or in which no capital sentencing hearing was held, frustrates any meaningful comparison for proportionality purposes. *See Bland*, 958 S.W.2d at 679 (Birch, J., dissenting).

[4]As I stated in my concurring/dissenting opinion in *State v. Godsey*, "[t]he scope of the analysis employed by the majority appears to be rather amorphous and undefined – expanding, contracting, and shifting as the analysis moves from case to case." 60 S.W.3d 759, 797 (Tenn. 2001) (Birch, J., concurring and dissenting.)

APPENDIX

(Excerpts from the Court of Criminal Appeals' Decision)

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

November 27, 2001 Session

STATE OF TENNESSEE v. DARYL KEITH HOLTON

Direct Appeal from the Circuit Court for Bedford County

No. 14302 William Charles Lee, Judge

No. M2000-00766-CCA-RD-DD – Filed July 17, 2002

OPINION

[Deleted: Summary of Facts]

[Deleted: Sufficiency of the Evidence]

[Deleted: Constitutionality of Tenn. Code Ann. § 39-11-501 (1997)]

Trial Conditions[1]

The appellant also argues that poor acoustics in the courtroom during his trial denied him the fair trial guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. In support of his argument, the appellant cites numerous instances in the record wherein the trial participants expressed difficulty hearing the proceedings.

Preliminarily, we note our supreme court's prior observation that the Fifth and Fourteenth Amendments to the United States Constitution guarantee a criminal defendant's right to a fair trial whereas the Sixth Amendment largely defines the basic elements of a fair trial. *State v. Carruthers*, 35 S.W.3D 516, 559 (Tenn. 2000) (citing *Strickland v. Washington*, 466 U.S. 668, 684-685, 104 S.Ct. 2052, (1984)), *cert. denied,* 533 U.S. 953, 121 S.Ct. 2600 (2001). In any event, the appellant correctly observes that a fair trial entails a jury mentally and physically capable of hearing and deliberating upon the evidence adduced at trial, *cf.* Tenn. Code Ann. § 22-1-102 (1994); *State v. Parton*, 817 S.W.2d 28, 33 (Tenn. Crim. App. 1991), in addition to a defendant's receipt of the effective assistance of counsel. Moreover, "[o]ne of the most fundamental responsibilities of a trial court in a criminal case is to assure that a fair trial is conducted." *State v. Franklin*, 714 S.W.2d 252, 258 (Tenn. 1986); *see also Parton*, 817 S.W.2d at 35 (observing that, regardless of the actions of the litigants or lawyers, the trial judge has the responsibility to make sure that the appellant receives a proper jury trial and the effective assistance of counsel). To this end, the trial court has "broad discretion in controlling the course and conduct of the trial." *State v. Caughron*, 855 S.W.2d 526, 541 (Tenn. 1993); *see also State v. King*, 40 S.W.3d 442, 449(Tenn. 2001); *State v. Evans*, 838 S.W.2d 185, 195 (Tenn. 1992).

The record reflects that all the trial participants, including the trial court, acknowledged the poor acoustics in the courtroom in which the

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[1]Appellant's issue III.

appellant was tried. The record also reflects, however, that the trial court provided the following instruction to the jury at the trial's commencement:

> This, as you all know, is an extremely important matter to both the State of Tennessee and the defendant. It is extremely important that you be able to hear all of these proceedings.
>
> Consequently if during the course of the presentation of the evidence or the arguments or statements of counsel you are unable to hear any party, a witness, an attorney, or myself, please let me know. We will have that person adjust their volume or speech pattern in such a manner that you may hear all of the evidence in this case. Do not hesitate to raise your hand at any time you are unable to hear the proceedings. We will make whatever adjustments as are necessary to see that you can hear.

Moreover, the record reflects that, during the course of the appellant's trial, jurors in fact informed the court if they were having any difficulty hearing a witness' testimony, and the trial court admonished the witness accordingly. Also, the court made "technical adjustments" to the courtroom arrangement in order to assist participants in hearing the proceedings, including providing "special hearing devices" to jurors during the replay of audio tape recordings. Indeed, in denying the appellant's motion for new trial, the court reaffirmed that, "shortly after the beginning of the trial ... I took control of the – at least the amplification system and replaced the microphones and rearranged the courtroom which I think helped tremendously." Counsel for both the State and the appellant joined in the trial court's efforts to eliminate the impact of poor acoustics by periodically cautioning witnesses to speak loudly and occasionally asking that witnesses repeat testimony.

Absent from the record is any indication by the trial court or counsel that the poor acoustics in the courtroom rendered the performance of their respective duties impracticable. Also absent from the record is any indication that the jury missed any portion of the proceedings due to the poor acoustics. Notably, defense counsel at no time requested a mistrial on the basis of the poor acoustics. "At most, the record supports a conclusion that, at times, it was difficult to hear in the courtroom." *People v. Duff*, 419 N.W.2d 600, 602 (1987). The appellant nevertheless suggests the application of the principle announced by the United States Supreme Court in *Estes v. Texas*, 381 U.S. 532, 542-543; 85 S.Ct. 1628, 1632-1633 (1965), that, although "in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused[,] ... at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process." *Cf. also Holbrook v. Flynn*, 475 U.S. 560, 568-572, 106 S.Ct. 1340 (1986). We simply disagree that the courtroom arrangement in this case presented a case of inherent prejudice, much less actual prejudice. *Cf. People v. Vaughan*, 340 N.W.2d 310, 312 (Mich. Ct. App. 1983) ("From the record it appears that the acoustic conditions in the courtroom were so intolerable and so interfered with the orderly conduct of the trial that defendant was denied a fair trial."). In short, the trial court properly exercised its discretion by taking the necessary steps to ensure that all participants could hear the proceedings. Accordingly, this issue is without merit.

The Constitutionality of the Death Penalty[2]

The appellant additionally asserts that the death penalty is violative of the fundamental right to life guaranteed by the United States and Tennessee Constitutions. Relying essentially upon substantive due process and equal protection principles, the appellant's argument is two-fold: (1) the death penalty never promotes a compelling state interest; and (2) even assuming the contrary, the State's pre-trial offer to the appellant of a sentence of life imprisonment in exchange for a guilty plea conclusively demonstrated

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[2]Appellant's issue II.

the availability in his case of less intrusive means to promote the State's interest. As noted by the State, both this court and our supreme court have previously rejected similar arguments. *See State v. Mann*, 959 S.W.2d 503, 517 & 536 (Tenn. 1997); *State v. Bush*, 942 S.W.2d 489, 507 & 523 (Tenn. 1997); *Brimmer v. State* 29 S.W.3d 497, 531 (Tenn. Crim. App. 1998); *Byron Lewis Black v. State* No. 01C01-97098-CR-00422, 1999 Tenn. Crim. App. LEXIS 324, at **73-74 (Nashville, April 8, 1999). The appellant is not, therefore, entitled to relief.

[Deleted: Review Mandated by Tenn. Code Ann. § 39-13-206(c) (1997)[3]

III. Conclusion

In summary, following a careful and extensive review of the record and the parties' briefs and upon making the determinations required by Tenn. Code Ann. § 39-13-206(c)91)(1997), we affirm both the appellant's convictions of first degree premeditated murder and his sentences of death.

NORMA McGEE OGLE, JUDGE

CONCUR:

DAVID H. WELLES, JUDGE

JERRY L. SMITH, JUDGE

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[3]Appellant's issues V and VI.

Appendix B

Opinion of the Court of Criminal Appeals of Tennessee Dated July 17, 2002

IN THE COURT OF CRIMINAL APPEALS

OF TENNESSEE

AT NASHVILLE

November 27, 2001 Session

STATE OF TENNESSEE v. DARYL KEITH HOLTON

Direct Appeal from the Circuit Court for Bedford County

No. 14302 William Charles Lee, Judge

No. M2000-00766-CCA-R3-DD - Filed July 17, 2002

The appellant, Daryl Keith Holton, was convicted by a jury in the Bedford County Circuit Court of four counts of first degree premeditated murder. The same jury imposed a sentence of death for each count of murder. The appellant now appeals both his convictions and sentences, presenting the following issues for our review: (1) whether the evidence adduced at trial is sufficient to support the jury's verdicts; (2) whether the statute setting forth the defense of insanity in Tennessee is violative of the United States Constitution in the context of a prosecution for first degree premeditated murder; (3) whether under the United States Constitution inadequate acoustics in the courtroom during his trial denied the appellant his right to a fair trial; (4) whether under the United States and Tennessee Constitutions the imposition of a sentence of death violates a criminal defendant's fundamental right to life; (5) whether the

evidence adduced during the guilt/innocence and sentencing phases of the appellant's trial supports the jury's imposition of sentences of death; and (6) whether the appellant's sentences of death are comparatively disproportionate. Following a thorough review of the record and the parties' briefs, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court are Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which DAVID H. WELLES and JERRY L. SMITH, JJ., joined.

John E. Appman, Jamestown, Tennessee (at trial and on appeal), and Donna Hargrove, A. Jackson Dearing, III, and Larry F. Wallace, Jr., Fayetteville, Tennessee (at trial), for the appellant, Daryl Keith Holton.

Paul G. Summers, Attorney General and Reporter; Michael E. Moore, Solicitor General; Mark E. Davidson, Assistant Attorney General; W. Michael McCown, District Attorney General; and Weakley E. Barnard, Robert G. Crigler, and Ann L. Filer, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

On April 20, 1998, a Bedford County Grand Jury returned a four-count indictment charging the appellant, Daryl Keith Holton, with the first degree premeditated murder of his four children on November 30, 1997. Specifically, the indictment arose from the appellant's confession to the fatal shootings of twelve-year-old Stephen Edward Holton, ten-year-old Brent Holton, six-year-old Eric Holton, and four-year-old Kayla Marie Holton.[4] The State filed a notice of its intent to seek the death penalty on April 20, 1998, which notice it supplemented on May 7, 1999. Ultimately, the State relied upon the appellant's commission of mass murder, Tenn. Code Ann. § 39-13-204(i)(12) (1997), in seeking the death penalty for all four counts of the indictment and additionally relied upon the age of the victims and the age of the appellant, id. at (i)(1), in seeking the death penalty for Counts Two, Three, and Four.

Soon after the State filed its notice of intent to seek the death penalty, on June 22, 1998, the trial court ordered that Dr. William D. Kenner, a psychiatrist, evaluate the appellant to determine his competency to stand trial for the murder of his children. Pursuant to the court's order, Dr. Kenner examined the appellant and concluded that the appellant was in fact competent. Indeed, following the appellant's trial, the trial court noted that the appellant had been evaluated by "no less than five mental health professionals [during the course of the capital proceedings] . . . . At no time [was] the Defendant . . . found incompetent." Having been found competent to stand trial, the appellant filed a notice on October 14, 1998, of his intent to rely upon the insanity defense at trial and introduce expert testimony in support thereof. A jury was impaneled and sworn and the guilt/innocence phase of the trial commenced on June 8, 1999.

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[4]As indicated subsequently in this opinion, Kayla Marie Holton was not the natural child of the appellant.

Guilt/Innocence Phase

The State presented a thorough and straightforward case during the guilt/innocence phase of these capital proceedings. Crystal Holton, the appellant's ex-wife, opened testimony on behalf of the State, recounting the history of her relationship with the appellant culminating in his murder of their children. According to Ms. Holton, she first met the appellant in 1984 when he was in the United States Army and stationed at Fort Jackson in South Carolina. Ms. Holton and the appellant married in August 1984, and shortly thereafter the Army reassigned the appellant to a post in Germany where he administered a dental clinic. While the appellant was stationed in Germany, Ms. Holton gave birth to two sons, Stephen and Brent, on August 23, 1985, and May 21, 1987, respectively. Ms. Holton noted that, during this time period, the appellant "was happy and doing a good job." Indeed, she remarked that the appellant "loved" his military career. As to their marriage, Ms. Holton characterized her relationship with the appellant as "[u]p and down."

Following the appellant's tour of duty in Germany, the Army reassigned the appellant to Fort Gordon in Georgia. Moreover, following the conclusion of the Gulf War, the appellant volunteered for service in Saudi Arabia. During the appellant's tour of duty in the Middle East, Ms. Holton remained in the United States with Stephen and Brent and gave birth to a third child, Eric, on September 27, 1991. Ms. Holton noted at trial that her third child suffered a hearing impairment requiring hearing aids for both ears.

Around the time of Eric's birth, the federal government began to route the appellant's paychecks incorrectly, and Ms. Holton began to encounter serious financial difficulties.

Moreover, Ms. Holton admitted to the jury that, one evening soon after Eric's birth, she went to a country music dance hall and left the children home alone. She stayed at the dance hall all night and, when she returned home in the morning, was greeted by the police and representatives from the Georgia Department of Human Services. The police declined to press criminal charges against Ms. Holton, and the Department of Human Services permitted her to retain custody of her children. Nevertheless, Ms. Holton placed her children in the care of the appellant's father in Shelbyville, Tennessee, and began to reside with a friend in Georgia.

Upon learning of these developments, the appellant secured an emergency leave of absence and returned to the United States for several days. However, he was unable to resolve his marital difficulties. Accordingly, when he returned to Saudi Arabia to complete his tour of duty, his children remained in the care of his father; meanwhile, Ms. Holton visited a cousin in Indiana and, at some point, moved to South Carolina.

The appellant finally returned to Fort Gordon in Georgia in early 1992 and, due to his wife's desertion, obtained a divorce and acquired custody of the children. Moreover, in order to facilitate his care of his three sons, he obtained an honorable discharge from the Army and moved with them to Tennessee. Ms. Holton recalled that the appellant brought the children to visit her in South Carolina two or three times each month.

On June 22, 1993, Ms. Holton gave birth to a fourth, biracial child named Kayla Marie as a result of a "one night stand" with a man named "Chuck." According to Ms. Holton, the appellant responded to the advent of this child "rather well." In fact, the appellant suggested that Kayla bear his last name.

Moreover, during Ms. Holton's pregnancy, she and the appellant began residing together once again in an apartment in Shelbyville, Tennessee. Although the appellant and Ms. Holton did not remarry, they lived together with the children for approximately one and one-half or two years. Ms. Holton admitted to the jury that she drank heavily during this period. Moreover, the appellant hit his ex-wife on numerous occasions, blaming his violence on Ms. Holton's drinking habit.

Ms. Holton eventually moved out of the apartment that she shared with the appellant, taking the children with her and seeking assistance from a battered women's shelter. After a brief stay in the shelter, Ms. Holton and the children moved into a public housing project in Murfreesboro, Tennessee. The appellant ultimately learned of their location and began visiting the children every day; at some point, a court awarded the appellant visitation with his children on weekends. Ms. Holton noted that, at this time, the appellant expressed to her concern about the crime rate in the neighborhood in which she and the children lived. Also, her housekeeping was mediocre, and the appellant frequently complained about the condition of her apartment. Finally, Ms. Holton admitted that she regularly accepted money from the appellant for the purchase of alcohol and, in fact, purchased several pint-sized bottles of liquor every week. She denied, however, demanding money or liquor as a condition of the appellant's visitation with the children. On the contrary, Ms. Holton noted that the appellant's visitation with the children proceeded smoothly until one Sunday night in 1995.

The 1995 incident began when the appellant drove the children home following a weekend visit but refused to allow them to get out of his car. Instead, the appellant informed his ex-wife that she would have to join the children in the car in order to see them. Although she did not see any weapon, Ms. Holton

received the impression from the appellant that he was armed. Accordingly, she refused to get into the car, whereupon the appellant stated that she was "going to regret it" and drove away with the children. Ms. Holton immediately called the police. On this occasion, however, the appellant learned of his wife's report to the police from a "police scanner" that he carried in his car, and he surrendered the children to the police unharmed. Ms. Holton recalled that the appellant continued to threaten that she would "regret it" if she ever took his children away from him.

Ms. Holton acknowledged at the appellant's trial that, during her residence in Murfreesboro, the Tennessee Department of Human Services briefly obtained legal custody of the children, albeit Ms. Holton retained physical custody. Thereafter, on February 27, 1996, Ms. Holton and the appellant agreed to the entry of an order by the Bedford County Juvenile Court granting Ms. Holton legal and physical custody of all four children. Indeed, the appellant informed the court that "it would be in the best interest of the minor children that full custody be granted to the natural mother with visitation to be at the discretion of the mother." The appellant continued visiting the children until the late summer or early fall of 1997, at which time Ms. Holton obtained an order of protection against the appellant and moved with the children to a different address. According to Ms. Holton, the appellant was unaware of the new address and did not see the children again until November 30, 1997, the day on which he murdered them.

In September 1997, Ms. Holton met a man named Morris Rhodes through a friend and neighbor with whom Rhodes had a five- or six-year-old daughter named Franchesca or, more familiarly, "Kiki." Ms. Holton and Rhodes initiated an intimate relationship and, in October 1997, began residing together along with Ms. Holton's children and, periodically, Kiki. At that time,

Ms. Holton believed that the appellant was unaware of her relationship with Rhodes.

Notwithstanding the order of protection and in response to the children's requests to see their father, Ms. Holton attempted to contact the appellant on November 27, 1997, Thanksgiving Day. Specifically, she called a garage in Shelbyville where the appellant was both working for his uncle repairing cars and currently residing, but no one answered the telephone. However, the appellant returned his ex-wife's telephone call the following day, inquiring why she had attempted to contact him. When Ms. Holton explained that the children "missed him and . . . wanted him to take them Christmas shopping," the appellant responded that "he didn't think anybody remembered he was still their dad." At some point, he also referred to Ms. Holton's current boyfriend and expressed concern that the children might be calling her boyfriend "Dad." Ms. Holton reassured the appellant and made arrangements for him to visit the children on Sunday, November 30, 1997. According to Ms. Holton, she was to leave the children with the appellant on Sunday at 3:00 p.m. in a Wal-Mart in Murfreesboro. The appellant was to return the children at 9:30 p.m. to the Rutherford County Sheriff's Department. Ms. Holton selected the latter location because her boyfriend was to collect Kiki from the child's mother at the sheriff's department on the same night.

The appellant telephoned Ms. Holton once again on Saturday, November 29, and inquired whether he should purchase the children clothing during the Sunday visit. Additionally, he requested permission to take the children to a movie theater in Shelbyville and remarked that he wanted the children to see a dog that he kept in the garage where he lived and worked.

On Sunday, the children appeared to be excited about the scheduled visit with their father. Brent drew his father a picture inscribed with the words, "From Brent and Kayla. I love you Daddy." Also, when the Holtons met at the Wal-Mart at 3:00 p.m., the children ran to the appellant and hugged him. The appellant returned his children's embraces. However, Ms. Holton recalled that the appellant appeared detached or "numb." After leaving her children in the appellant's care, Ms. Holton never saw them alive again.

At approximately 9:44 p.m. on November 30, 1997, the appellant walked into the lobby of the Shelbyville Police Department and informed the dispatcher, Bonnie Hill, that he wished to report a "homicide times four." Hill testified at the appellant's trial that the appellant appeared to be calm and, indeed, displayed no emotion. Hill asked the appellant to wait in the lobby and, because there were no officers present at the police station, radioed for assistance. Sergeant Nicholas Worthington arrived at the station soon thereafter.

Sergeant Worthington of the Shelbyville Police Department testified at trial that he was driving into the parking lot of the police station when he overheard Hill on the radio requesting assistance. Accordingly, Worthington went inside the station and briefly spoke with Hill before approaching the appellant. In response to Worthington's questioning, the appellant stated his name, address, and birth date and again indicated that he wished to report four homicides. When Worthington further inquired how the appellant had learned of the homicides, the appellant responded that he had killed his four children. The appellant then spontaneously stood and placed his hands behind his back in order to allow Worthington to handcuff him.

Upon handcuffing the appellant, Worthington ceased any questioning. Nevertheless, the appellant continued to talk, explaining to Worthington that he had murdered his children because his wife and the Department of Human Services had withheld them for several months without permitting the appellant visitation. The appellant also informed Worthington that he had killed the children in his uncle's automobile repair garage with an SKS semi-automatic rifle and indicated that both the murder weapon and the bodies were still inside the garage.

Worthington recalled at trial that, during his encounter with the appellant, the appellant spoke in a matter-of-fact tone and appeared very calm, never exhibiting any "extraordinary or b[i]za[rre]" behavior. Officer Rodney Stacey, who had known the appellant for approximately four or five years prior to these offenses, arrived at the station shortly after Worthington and similarly testified at trial that the appellant appeared very calm and normal.

Worthington and Stacey left the appellant at the police station in the care of another officer and drove to "Holton's Wrecker Service and Garage." As Worthington and Stacey left the police station, the appellant warned them that there was a homemade explosive device inside the garage. At the garage, the officers in fact discovered homemade incendiary devices in addition to the murder weapon and the children's bodies. The children's bodies were stacked underneath a tarpaulin in a rear bay of the garage.

Detective Pat Mathis of the Shelbyville Police Department testified at the appellant's trial that at approximately 11:00 p.m. on November 30, 1997, he received a call from Lieutenant Chris Szaroleta notifying him of a homicide at

Holton's Wrecker Service and Garage. Accordingly, Mathis drove to that location and examined the crime scene. After examining the scene, he drove to the police station with Szaroleta and Detective Tony Collins for the purpose of interviewing the appellant. At the station, Mathis noted that "there was bloodstains and tissue matter on [the appellant's] clothing." Subsequent testing revealed that blood on the appellant's clothing contained DNA profiles matching those of the appellant's children.

As to the officers' interview of the appellant, Collins first advised the appellant of his Miranda rights, and the appellant signed a written waiver of those rights. Mathis recalled that, during the interview, the appellant was calm and cooperative. He denied having drunk alcohol that day, although he stated that he had unsuccessfully "tried to smoke a joint" following the murders. The appellant also denied that he was in any way intoxicated. Mathis observed that the appellant appeared to have no difficulty recalling past events and appeared to answer the officers' questions truthfully, thinking carefully about each response. Indeed, the appellant provided details about the murders that were consistent with Mathis' observations at the crime scene. Moreover, the appellant provided a second statement on December 3, 1997, that was likewise consistent with the results of the police investigation of the murders.

The appellant related to the police that he had first considered murdering his children approximately two years before these offenses. On that occasion, he was driving the children home to their mother following a weekend visit and was armed with a "Derringer." The appellant recalled, however, that he "couldn't do it" and instead contacted the police. The appellant did not communicate to the police at that time that he was contemplating murdering his children. Nevertheless, the

officers removed the children from his care, confiscated his weapon, and advised him to seek counseling. The appellant did not follow the officers' advice.

The appellant further related that approximately two months prior to these offenses, in September, his ex-wife had obtained an order of protection against him due to a "domestic assault." The appellant recalled:

> [A] police officer came and told me that I would not be able to see my children, and I had to come to court. I did not come to court.
>
> I kept driving by [my ex-wife's apartment] and wanting something to happen. I wanted her to call. I would go up to Murfreesboro and drive by the apartment. It never happened, and then all of a sudden everything was gone. There were no lights, no clothes on the line, or nothing. They were gone.

According to the appellant, his ex-wife finally called on Friday, November 28, in order to make arrangements for the appellant's visitation with his four children. The appellant decided at that time that he was going to murder the children. He explained that "[t]he kids had been taken away from me and given back to me, taken away from me and given back to me enough." The appellant elaborated:

> If you take - - you take somebody's kids away, you've made a terrible mistake. And there is the tendency of social agencies, churches, courts, there's the tendency to take the children, place them with their mother, and forget the father. Not

> one time, not one time did anyone contact me until Thursday. They didn't get in touch with me Thursday, but they tried Thursday. They finally got in touch with me Friday, telling me how my kids were and where they were, to offer me anything.
>
> And I spent ten and a half years in the Army. I spent a lot of time away from my children. That's what it was all about. I busted my ass. I did a good job, not just for me, for my children, for my family, that house in the country, that dream. I can speak for myself. I don't . . . have that taken away too easily and just get over it. I didn't get over it.

On Friday, November 28, the appellant made arrangements with his ex-wife to see his children on Sunday and during the intervening time period formulated a specific plan according to which he would murder the children in his living quarters in the rear bay of his uncle's garage during the Sunday visit. In preparation for the murders, he hid a loaded SKS semi-automatic rifle behind a mattress in his living quarters. Moreover, he parked a car outside his uncle's garage for his use following the murders, pointing the vehicle in the direction he would need to travel. In particular, the appellant planned to drive to Murfreesboro after murdering his children and "to basically shoot" Kiki, the five- or six-year-old daughter of his ex-wife's current boyfriend, in addition to firebombing his ex-wife's new residence. For the purpose of firebombing his ex-wife's residence, he prepared five incendiary devices or "fire bombs." He also ascertained his ex-wife's new address using a telephone book, street maps, and the number that he had retrieved from the caller identification device attached to the telephone at his

uncle's garage. Furthermore, having discovered his ex-wife's address, the appellant drove by her residence on the day before the murders.

On Sunday, November 30, the appellant retrieved his children from his ex-wife at a Wal-Mart in Murfreesboro. He recalled that Ms. Holton "was dressed nicely. She was wearing makeup. She said she was happy. And that did not make me happy." He also related that his children "all came up and hugged me. Kayla just wouldn't let go of me. As many times that I hadn't seen them for a while, and she grabbed me and she wouldn't let me go." Notwithstanding his children's obvious joy at reuniting with their father, the appellant never reconsidered his plan to murder them.

The appellant took his children to a McDonald's restaurant to eat dinner and to an amusement park or arcade before driving them to his uncle's garage. He noted to police that he "had to play along to avoid any suspicion on the children's part." At the garage, the appellant showed the children several motors and permitted them to play with some of the tools. The appellant also recalled, "We just told each other we missed each other." Finally, at approximately 7:00 p.m. or 7:30 p.m., the appellant left Eric and Kayla playing in a front bay of the garage with an electric drill and a hammer and led Stephen and Brent to the rear bay where he had earlier hidden the SKS rifle.

In the rear bay, the appellant indicated to his older sons that he "had something for them." He then instructed them to close their eyes and stand in a line facing away from him, with Stephen in front and the shorter Brent behind. The appellant cautioned, "Don't peek," before removing the SKS rifle from its

hiding place, kneeling behind the children, and aiming the rifle. The appellant explained that he positioned the children to enable him to pierce their hearts with a single shot. When he fired the first shot, the barrel of the rifle was angled upward and touching Brent's back. The appellant conceded that he "used multiple shots to ensure that [he] killed them both" and recalled that he covered their bodies with a tarpaulin to conceal them from their younger siblings.

The appellant next brought Eric and Kayla to the rear bay, again indicating that he "had something for them." The two children evidently had not heard any gunshots and inquired about their older brothers. In response, the appellant positioned them in a line as he had their brothers, "placed their hands over their eyes," and instructed them not to peek before kneeling behind them and firing the rifle into Kayla's back. Both children were struck by the first bullet, and the appellant recalled firing his weapon at least one more time into Kayla's chest. The appellant placed Kayla's and Eric's bodies with their older brothers' underneath the tarpaulin, "squared away the area," and washed his hands. The appellant noted to police that "[t]here was no enjoyment to [the murders] at all."

After murdering his children, the appellant prepared to execute the next phase of his plan, i.e., the murder of Kiki and the firebombing of his ex-wife's residence. The appellant reloaded the SKS rifle and placed the murder weapon and the five "fire bombs" inside the car that he previously had parked outside. He also "checked out the entrance of the shop to see if there was anything amiss, if anyone could have seen me." Moreover, he was listening to a "police scanner" "to see if there had been any reports of gunshots or anything." He then began to drive toward Murfreesboro but soon decided that he did not have enough time to execute the remainder of his plan. Accordingly,

he returned to his uncle's garage. The appellant noted that, at the garage, he had difficulty looking at his children's bodies. He considered committing suicide but ultimately resolved to surrender to the police.

In explaining his decision to curtail his original plan, the appellant noted, "I planned a lot of different scenarios and chose the one that time permitted. I was constantly subtracting - - going over what . . . options . . . - - were left." The appellant also observed, "I had done what I wanted to do. I wanted to shock [my ex-wife] to death. I was done. I was done." As to his decision to forego suicide, the appellant added that the murders were

> the culmination of a lot of work . . . [and] people would come up with their own conclusions if I [illegible] myself. This is only part of the story of what happened here. This is gruesome. This is awful. But it's only part of it. This has been going on for a long time. And if you're going to have a chance of understanding this, then you're going to have to talk to somebody that was involved. And I'm the only one that was involved that's still living.

The appellant concluded that he loved his children but conceded that he would have difficulty convincing anyone of his love. He felt no remorse or regret for murdering his children.

The State also presented the testimony of Dr. Charles Warren Harlan, a consulting forensic pathologist and assistant medical examiner for Bedford County. Dr. Harlan testified that he performed autopsies on the appellant's four children, and he described the findings relating to each child in turn. First, Harlan

related that ten-year-old Brent Holton died as a result of multiple gunshot wounds to the chest. Specifically, the doctor discovered two "contact gunshot wound entrances" in Brent's posterior chest or back and two corresponding exit wounds in Brent's anterior chest. Dr. Harlan opined that the contact entry gunshot wounds and the corresponding exit wounds were consistent with a scenario in which "a person . . . knelt down behind Brent Holton pointing the gun in an upward angle and pull[ed] the trigger." The doctor further noted that the wounds occurred in "very close time proximity." Finally, Dr. Harlan recounted that he also discovered one "re-entry gunshot wound" in Brent's anterior chest or "front right shoulder area." Dr. Harlan explained that a "re-entry gunshot wound" is caused by "a bullet which . . . passe[s] through an intermediate target" or "bounc[es] off of something" prior to striking a person's body. He posited that one of the bullets causing the contact entry gunshot wounds and the corresponding exit wounds may have ricocheted off the concrete floor of the garage and re-entered Brent's body. Dr. Harlan recovered the bullet from the child's body.

Dr. Harlan next testified that twelve-year-old Stephen Holton died as a result of multiple gunshot wounds to the chest and abdomen. Specifically, Dr. Harlan discovered one "re-entry gunshot wound" in Stephen's posterior chest or back. The doctor reiterated that a "re-entry gunshot wound" is one caused by a bullet that "has either gone through some intermediate target or been deflected." A corresponding exit wound was located in Stephen's anterior chest. The doctor confirmed that the wounds were consistent "with someone kneeling . . . holding a gun at an angle upward, shooting through Brent, that bullet passing through his body and entering Ste[ph]en's and then still having enough force and velocity to pass through [Stephen's]." Dr. Harlan continued that the same bullet inflicted a "graze gunshot wound" to Stephen's chin and nose. The pathologist further noted a contact gunshot wound to Stephen's anterior chest and

abdomen and a corresponding exit wound. Finally, he attested to entry and exit gunshot wounds to Stephen's right hand.

As to the four-year-old Kayla Holton, Dr. Harlan testified that she too died as a result of multiple gunshot wounds. Specifically, Kayla suffered a contact entry gunshot wound to the posterior chest or back and a corresponding exit wound. The doctor confirmed that the wounds were consistent with a scenario in which a person knelt behind Kayla, held a gun at an upward angle with the barrel touching her back, and pulled the trigger. Additionally, the doctor observed another entry gunshot wound to Kayla's anterior chest and a corresponding "partial exit" wound. He testified that these wounds were consistent with a scenario in which "[t]he child is standing up. Shooter is kneeling down . . . . Shoots her in the back. She falls down. Falls on her back. She is l[]ying front up . . . on concrete. Concrete floor. Then the shooter stands over her with a gun . . . and go[es] bang." The doctor retrieved "an extremely deformed bullet" and "smaller lead fragments" from Kayla's body.

Lastly, Dr. Harlan testified that the six-year-old Eric Holton died as a result of multiple gunshot wounds to his chest and abdomen. Specifically, the doctor recorded four entry gunshot wounds to Eric's posterior chest or back, at least one of which was possibly a "re-entry gunshot wound." Dr. Harlan noted that he was unable to determine whether the wounds were caused by three or four bullets. He explained that, if a bullet first passed through another person, the projectile might have split in two and inflicted two separate wounds to Eric's back. Eric also suffered two exit wounds to his anterior chest and abdomen, one of which was extremely large and likely resulted from more than one bullet. Finally, Eric suffered a gunshot wound to his right wrist. Dr. Harlan concluded that Eric's wounds were consistent with a scenario in which "[Eric] was standing in front of Kayla

when she was shot. . . . [The shooter] was kneeling down . . . [when] he fired a shot through Kayla's back . . . . Eric had been told not to peek. . . . [H]e was told to close his eyes and place his hands over his eyes." Dr. Harlan recovered one bullet and several bullet fragments from Eric's body.

Teri Arney, an employee of the Firearms Identification Unit of the Tennessee Bureau of Investigation (hereinafter the TBI), identified at trial the SKS semi-automatic rifle and various spent bullets and cartridges recovered from the scene of the murders in this case. Moreover, Dan Royce, a firearms examiner with the TBI, noted that the rifle was functional and confirmed that spent bullets and cartridges recovered from the scene of the murders and spent bullets or bullet fragments recovered from the children's bodies were fired from the SKS rifle.

The appellant declined to testify in his own behalf. He did, however, present testimony in support of a defense of insanity and, alternatively, the proposition that he did not possess the capacity at the time of the murders to form the requisite mental state for first degree premeditated murder. In this regard, he first called Captain Daniel G. Brooks, the administrator of the Bedford County Jail, to the witness stand. Brooks testified that the appellant was placed on "suicide watch" for approximately one week upon his admittance to the jail following his arrest for the murder of his children. Brooks noted, however, that the appellant was a quiet and cooperative prisoner.

The appellant also presented the testimony of his uncle, Gary Holton. Holton testified that he is an automotive technician and owns an automobile repair shop or garage in Shelbyville, Tennessee. At the time of the murders, the appellant had been employed in Holton's automobile repair garage for two or three

years and had been residing in a rear bay of the garage for as few as four months. Holton recalled, "It was a bay that was 30 [feet] by approximately 24 [feet]. [The appellant] had plastic tarps draped [around] an area that he slept in that . . . was probably about a little more than a fourth of the size of [the] entire bay." Holton noted that the appellant used a propane heater to heat the area enclosed by tarpaulins, and the appellant's uncle recalled accompanying him on one or two occasions to purchase propane gas. Holton tentatively remembered that the temperature outside was between forty and fifty degrees Fahrenheit on the day of the murders.

Holton confirmed that, following the murders, the police returned to the scene of the crimes with a person or persons named Mosley,[5] who reconstructed the appellant's living quarters and tested the propane heater inside the enclosed area. Holton conceded that Mosley reconstructed the appellant's living quarters "better and tighter than it originally was." He also noted that the outside temperature was very cold at the time of the reconstruction of the appellant's living quarters and the testing of the heater.

Finally, Holton recounted to the jury that, prior to the murders, he saw his nephew daily. According to Holton, "After [the appellant] didn't get to see his kids, seemed liked he withdrew further and further. He became quieter and withdrawn, unresponsive. Totally unlike him." Also, the appellant's energy level seemed to decline. On the day of the murders, however, the appellant's mood changed "drastically." Holton asserted that the appellant appeared to be "very happy to get to see his children."

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[5]This name is spelled "Mosely" elsewhere in the record.

Dr. Leighton Sissom, a mechanical engineer, also testified on behalf of the appellant. Dr. Sissom related to the jury that he examined the rear bay of Holton's garage in which the appellant had resided prior to and at the time of the murders and obtained information from Holton concerning the appellant's living quarters. In particular, he obtained information from Holton concerning the arrangement of the plastic tarpaulins enclosing the appellant's living quarters. He did not, however, attempt to reconstruct the living quarters. Finally, Dr. Sissom examined the propane heater used by the appellant to heat his living quarters.

On the basis of his investigation, Dr. Sissom concluded that the ventilation of the appellant's living quarters was inadequate for use of the propane heater according to standards set forth both in the National Fuel Gas Code and in the operating instructions provided by the manufacturer of the heater. He noted the probability that carbon monoxide or nitrogen dioxide emissions from the heater accumulated in the appellant's living quarters. However, he was unable to testify with any certainty that the appellant was exposed to carbon monoxide on or before November 30, 1997, or state the degree of the appellant's probable exposure. Moreover, he conceded that testing of the heater did not reveal significant emissions of carbon monoxide. On the contrary, the heater was functioning properly.

Dr. Donna Seger, a toxicologist, testified on behalf of the appellant concerning the effects of carbon monoxide upon the human body. She related to the jury that carbon monoxide poisoning can affect a person's central nervous system, brain, and heart. She particularly noted that carbon monoxide poisoning can "have marked effects on memory, concentration; [can cause] decrease in IQ, marked inability to think in the way one had thought before; as well as depression, psychosis, neurologic deficit." She remarked, however, that the effects of

carbon monoxide poisoning will vary depending upon "the length of time of exposure; the concentration during that time of exposure; the peak concentration reached during that time; the physical activity of the person; metabolic state of the person; and pre-existing medical disease." She conceded that she had not examined the appellant, nor was she familiar with the appellant's case.

The appellant further introduced a transcript of the deposition of Dr. Howard S. Kirshner, a neurologist. Dr. Kirshner testified that he interviewed the appellant and performed a neurological examination of the appellant on December 1, 1998, approximately one year following the appellant's offenses. He also reviewed a report of a forensic neuropsychological evaluation performed by Dr. Pamela Auble. He explained that he was primarily searching for symptoms or indications of carbon monoxide poisoning.

Dr. Kirshner conceded to the jury that he had treated very few patients in the past for carbon monoxide poisoning. Notwithstanding his limited experience, he related generally that severe carbon monoxide poisoning can cause seizures, paralysis, coma, and ultimately death. Less severe poisoning can result in acute symptoms including sleepiness, headaches, "associated trouble with thinking," "coordination problems," and a pink coloration of the skin; chronic symptoms include "memory loss or trouble with attention and concentration," "coordination difficulty," and "tremor and rigidity and stiffness." Additionally, poisoning might cause irritability "after there's been some recovery some weeks or months after the initial exposure." Finally, magnetic resonance imaging (hereinafter M.R.I.) of the brain will sometimes reveal the impact of carbon monoxide poisoning upon the brain as "small spots" or "multiple small holes like Swiss cheese."

During his interview with Dr. Kirshner, the appellant reported experiencing headaches, irritability, and a lack of energy following his purchase of a propane heater in October 1997. Moreover, the appellant reported that, following his offenses and while residing in the Bedford County Jail, he experienced difficulty studying calculus, remembering what he had eaten for breakfast, and remembering to telephone his father. The appellant had no difficulty remembering the murder of his children, albeit he declined to describe the details of the murders to Dr. Kirshner.

Dr. Kirshner's neurological examination comprised four components: an examination of the appellant's mental status, an examination of his cranial nerves, a "motor examination,"and a "sensory examination." The results of the testing were largely "normal" with the sole exception of "an abnormally slow rate of movement on some fine coordination tests. Rapid alternating movements and fine finger movements." Moreover, an M.R.I. test of the appellant's brain produced normal results with the exception of an "inflamed sinus." Nevertheless, Dr. Kirshner opined that the results of his testing did not preclude carbon monoxide poisoning and accompanying impact upon the appellant's brain and, therefore, behavior. The doctor clarified that "carbon monoxide poisoning can produce changes that are microscopic and that wouldn't necessarily be seen on an M.R.I. scan," and the "minor problem with coordination and fine finger movements would be consistent with carbon monoxide poisoning." He also acknowledged that Dr. Auble "found a higher level of cognitive dysfunction as well as mild motor slowing bilaterally" and that his testing was less sensitive than testing performed by Dr. Auble. That having been said, Dr. Kirshner declined to diagnose the appellant with carbon monoxide poisoning.

Dr. Pamela Auble, a clinical neuropsychologist, testified that she interviewed the appellant and administered various standardized tests to the appellant in June 1998, approximately six months following the appellant's offenses. She also reviewed various records pertaining to the appellant, including the appellant's military records, Dr. Sissom's report, the report of a psychiatric evaluation performed by Dr. William D. Kenner, and the report of a neuropsychological examination performed by Dr. Daniel Martell.

Dr. Auble related to the jury that her testing of the appellant's "thinking and memory and attention" revealed that the appellant has a superior intelligence quotient (IQ) of 120 and was proficient in basic language skills, in learning verbal information, and in transitioning between different ideas. However, he was experiencing deficits in the processing of information, in learning visual information, and in motor speed and manual dexterity. Dr. Auble's testing of the appellant's personality further revealed that he experienced difficulty relating to people. However, the neuropsychologist noted that the appellant was not depressed, anxious, or psychotic at the time of the June 1998 interview. Furthermore, in June 1998, the appellant fully comprehended the nature and consequences of his offenses, and he was able to distinguish between right and wrong.

Like Dr. Kirshner, Dr. Auble opined that the results of her testing were consistent with past exposure to carbon monoxide. Also like Dr. Kirshner, however, she declined to definitively conclude that the appellant was, in fact, exposed to carbon monoxide. Rather, Dr. Auble opined that the appellant was suffering from major depression at the time he murdered his children, basing her conclusion primarily upon information obtained from the appellant during the June 1998 interview and

other records pertaining to the appellant. She posited that the appellant's depression at the time of the murders stemmed from the termination of his marriage and "his concerns over [the] well-being of his children." Correspondingly, she explained the contrast between the appellant's mental state at the time of her evaluation and his mental state at the time of the murders by observing that, "at the time I saw him as he said it, really he didn't have to worry about his children anymore and how they were being taken care of. In November of '97 that was a very big concern for him." In short, at the time of Dr. Auble's interview of the appellant in June 1998, he was "glad [his children] were dead."

Dr. William D. Kenner, a psychiatrist, testified on behalf of the appellant. Dr. Kenner related that he interviewed the appellant in June and July 1998. He also interviewed several members of the appellant's family, examined medical records pertaining to the appellant, reviewed reports of evaluations of the appellant performed by Dr. Kirshner and Dr. Auble, reviewed reports issued by Dr. Sissom and Ralph Mosley, and consulted with Dr. Auble and Dr. Seger concerning the appellant's case. Finally, he reviewed literature concerning both "filicide," i.e., the phenomenon of parents killing their children, and carbon monoxide poisoning.

Dr. Kenner noted that filicide is closely associated with the occurrence of major depression, particularly "agitated depression." Dr. Kenner explained that a parent suffering from "agitated depression" will be "kind of bland but they keep moving all of the time and they can't sleep. They can't focus their attention and so forth." Moreover, such depression is frequently accompanied by "psychotic features" or delusional thoughts. In particular, Dr. Kenner noted that a severely depressed parent may believe that his life is worthless and reach

the same conclusion about his children's lives. He will therefore murder his children in the belief that he is "sav[ing] them from what . . . is a terrible fate and that is to go on and live." The psychiatrist labeled such murders "altruistic murders" and remarked that "[t]he interesting thing is the more a parent loves his or her children, the greater the risk is that they will kill them if they get severely depressed." He also observed that, in contrast to mothers who commit filicide, fathers who commit filicide

> will more often kill themselves or . . . they will kill their wife; if neighbors' kids happen to be over visiting or anything like that, they can sometimes be included.
>
> Fathers will also kill the family pets . . . .

Often, the death of the children affords the depressed parent a sense of relief. Dr. Kenner concluded, "This is a severe illness."

Dr. Kenner asserted that the appellant matches the profile of a father who would commit filicide. Dr. Kenner noted the appellant's close relationship with his children. Moreover, the psychiatrist opined that the appellant was suffering from major depression at the time of the murders. In particular, Dr. Kenner observed that the appellant's family history includes several suicides, and the appellant's father was an alcoholic. Moreover, prior to the murders, the appellant had reportedly experienced several episodes of depression. Indeed, Dr. Kenner learned from his interviews with the appellant and the appellant's family members that, during the months preceding the murders, the appellant was

> unable to sleep or take time from work. He would work until 10 p.m. every night. He worked seven days a week except when he went to see his kids.
>
> He lost interest in all other activities except for work and taking care of his children as much as he could.
>
> He had - - [family members] described difficulty in thinking and concentration. He would speak slowly at times and he would kind of stare off into space. Looked spacey in their words.
>
> In the month before the crime, his father found him lying on the floor without speaking. Just a grown man lying on the floor for no reason.
>
> [Family members] also noticed that he had lost weight. His eyes looked sunken. You could see his ribs. They were showing through his chest wall. He withdrew from people. Withdrew from any kind of human contact.

Additionally, the appellant's father reported to Dr. Kenner that, one month prior to the murders, the appellant expressed a desire to commit suicide.

Dr. Kenner added that the appellant's depression was exacerbated by carbon monoxide poisoning. However, he emphasized that

> this crime has much more to do with major depression than carbon monoxide. Carbon monoxide is an additive issue here. It is not the sort of underlying issue that had he just had carbon monoxide poisoning that certainly wouldn't have produced a crime like this.
>
> . . . .
>
> People that have carbon monoxide poisoning don't kill their kids. It is only people who have major depression who do that. Carbon monoxide poisoning is going to make somebody who has a major depression worse; make them more irritable.

Dr. Kenner conceded that a person can suffer from major depression and remain capable of distinguishing right from wrong. More specifically, the psychiatrist concluded that parents who commit filicide "know it's against the law but [typically believe] it's done for almost the right reasons."

In rebuttal, the State presented the testimony of Ralph Mosley, a "certified safety professional" and an expert in the field of industrial safety. Mosley testified that, on September 10, 1998, he visited the scene of the murders. In the rear bay of Holton's garage, Mosley reconstructed the appellant's living quarters and tested the performance of the appellant's propane heater within the enclosed area. Mosely reconstructed the appellant's living quarters based upon descriptions he received from the police as well as the appellant's uncle. When the reconstruction was complete, he turned on the propane heater and allowed the temperature in the living quarters to rise to 76 degrees Fahrenheit. Then, while the heater continued to operate, Mosley collected air samples over a thirty-six-minute period. Subsequent testing of the air samples revealed that the heater's

emissions were "well within" standards set forth by the state and federal governments. Indeed, Mosley observed that no contaminants "even came close to a threshold level or permissible level that the government[] allows. They were all well underneath those levels." Mosely did not detect any carbon monoxide in the air. Mosely explained that propane is the cleanest burning fuel available, having less of a propensity to produce carbon monoxide than any of the common petroleum-based fuels. Mosley conceded that he did not compare his reconstruction of the appellant's living quarters with any applicable air ventilation standards. However, he noted that, in reconstructing the living quarters, he attempted to allow as little ventilation as possible in order to simulate a "worst-case scenario."

The State also presented in rebuttal the testimony of Dr. Daniel Martell, a forensic neuropsychologist. Dr. Martell interviewed and administered tests to the appellant on March 30, 1999. Additionally, Dr. Martell reviewed the police reports concerning the appellant's offenses, including the appellant's confessions, and the appellant's medical records and reports issued by other experts testifying in the appellant's case. Finally, he visited the scene of the murders and spoke briefly with the detectives investigating the appellant's offenses.

Dr. Martell agreed with both Dr. Auble and Dr. Kenner that the appellant was suffering from major depression at the time of the murders. Indeed, Dr. Martell noted that the appellant was suffering from depression at the time of the March 30, 1999 interview. Consistent with these observations, the neuropsychologist remarked that records pertaining to the appellant reflected a history of depression. Also, Dr. Martell added that the appellant was suffering from a personality disorder with two components. First, the appellant was "passive

aggressive," "a particular disorder in which people act out their anger or hostility sometimes in passive ways." Second, the appellant had a "schizoid personality." In other words, he was a "loner, a person who isolated himself from others and has poor social skills." Finally, with respect to the possibility of carbon monoxide poisoning, Dr. Martell concluded:

> I had seen the report of . . . Dr. Sissom as well as the reports of . . . Dr. Kenner and Dr. Auble. I was quite persuaded, however, by Mr. Mosely's report that there was not carbon monoxide being produced by that heater. That together with the MRI study that was done at the hospital by Dr. Kirshner, which showed none of the holes in the brain that you would expect to see in someone with carbon monoxide poisoning, and the fact that his neuropsychological test scores could clearly be explained by his depression, leads me to the conclusion that he did not suffer from any form of carbon monoxide poisoning.

In contrast to Dr. Auble and Dr. Kenner, Dr. Martell specifically addressed the appellant's capacity to intend and premeditate his children's deaths. Dr. Martell asserted that in fact the appellant was capable of forming the requisite mental state. He noted the appellant's contemplation of murdering his children for several years prior to November 30, 1997, and the appellant's elaborate planning and preparations over several days prior to the murders, including the formulation of "a time chart of exactly how this would go off." The neuropsychologist also emphasized the manner in which the appellant murdered his children, targeting their hearts and firing multiple shots to ensure their deaths.

Dr. Martell likewise affirmed the appellant's ability to appreciate the nature or wrongfulness of his actions at the time of these offenses. In this regard, he emphasized the appellant's efforts to conceal both his plans and the accompanying preparations for his offenses from everyone including his wife and children and his use of a "ruse" or "trick" to lure his children into positions conducive to the planned murders. Moreover, Dr. Martell recalled the appellant's account to him that,

> [d]uring the time he is committing these crimes, he has had enough forethought and enough planning to put on the police scanner so that he can be listening to see if anybody hears his gunshots and reports it to the cops and be able to make a hasty retreat from where he is . . . .
>
> He also says that he has parked his car in such a way that it is not faced in but faced out so that he can get away quickly if he should be discovered in what he is doing.
>
> These behaviors are indications to me that he appreciates the nature of what he is doing. He appreciates the fact that it is wrong to kill the children because he is listening for the police in case he might get caught.

Dr. Martell additionally noted the appellant's statements that, following the offenses, he concealed the bodies and the murder weapon from view and washed blood from himself. Indeed, the appellant's ultimate surrender to the police was itself an acknowledgment of wrongdoing.

Dr. Martell concluded that, although depression may affect a person's "judgment and thought processes," "depression is not so severe a disorder, and certainly was not in Mr. Holton's case, that you can't understand the nature and consequences of your behavior," including the wrongfulness of your behavior, or intend to engage in that behavior or premeditate that behavior. Contradicting Dr. Kenner's theory of "altruistic murders," Dr. Martell observed with interest the appellant's inclusion of the daughter of his wife's current boyfriend in his list of planned targets, remarking that the appellant was a very "angry" person at the time of the offenses in addition to suffering from depression, and he "was looking to cause as much pain to his ex-wife and her new boyfriend as he could."

Following the parties' presentation of proof, the jury deliberated for fifty minutes and found the appellant guilty of all four counts of first degree premeditated murder. The court immediately proceeded to the sentencing phase of the appellant's trial.

Sentencing Phase

As noted previously, the State sought to establish at the sentencing phase the following aggravating circumstances: with respect to all four counts of the indictment, the appellant's commission of "'mass murder,' which is defined as the murder of three (3) or more persons whether committed during a single criminal episode or at different times within a forty-eight-month period," Tenn. Code Ann. § 39-13-204(i)(12); and, with respect to the counts pertaining to ten-year-old Brent Holton, six-year-old Eric Holton, and four-year-old Kayla Marie Holton, the murder was committed against a person less than twelve years of age, and the appellant was eighteen years of age or older, id. at (i)(1). In establishing the above aggravating factors, the State

essentially relied upon the proof adduced during the guilt/innocence phase of the appellant's trial but also re-submitted for the jury's consideration both the appellant's November 30, 1997 confession containing the appellant's birth date and the custody order issued by the Bedford County Juvenile Court on February 27, 1996, containing the children's birth dates.

The appellant did not dispute the applicability of the above aggravating circumstances but instead asserted that the aggravating circumstances were outweighed by the following mitigating circumstances: (1) the defendant has no significant history of prior criminal activity; (2) the murder was committed while the appellant was under the influence of extreme mental or emotional disturbance; (3) the murder was committed under circumstances that the appellant reasonably believed to provide a moral justification for his conduct; (4) the capacity of the appellant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of a mental disease or defect that was insufficient to establish a defense to the crime but substantially affected his judgment; and (5) any other mitigating circumstance raised by either the prosecution or the defense during both the guilt/innocence phase of the trial and the sentencing phase. See Tenn. Code Ann. § 39-13-204(j).

Like the State, the appellant primarily relied upon the evidence adduced during the guilt/innocence phase. In this regard, the appellant acknowledged on the record that, contrary to the advice of his counsel, he was largely foregoing the presentation of additional mitigating evidence. The appellant did, however, recall to the witness stand Captain Dan Brooks, the administrator of the Bedford County Jail. Brooks testified that the appellant had been incarcerated in the jail since November

30, 1997, and, during his residence in the jail, had obeyed the rules, performed assigned tasks satisfactorily, and interacted well with staff members. Brooks additionally noted that the appellant was isolated from other inmates at his own request but regularly received visits from family members.

After deliberating for two hours and fifteen minutes, the jury returned sentences of death for each count of the indictment. The appellant now appeals both his convictions and sentences. Again, the appellant presents the following issues for our review: (1) whether the evidence adduced at trial is sufficient to support the jury's verdicts; (2) whether the statute setting forth the defense of insanity in Tennessee is violative of the United States Constitution in the context of a prosecution for first degree premeditated murder; (3) whether under the United States Constitution inadequate acoustics in the courtroom during his trial denied the appellant his right to a fair trial; (4) whether under the United States and Tennessee Constitutions the imposition of a sentence of death violates a criminal defendant's fundamental right to life; (5) whether the evidence adduced during the guilt/innocence and sentencing phases of the appellant's trial supports the jury's imposition of sentences of death; and (6) whether the appellant's sentences of death are comparatively disproportionate.

II. Analysis

Sufficiency of the Evidence[6]

In order to successfully challenge the sufficiency of the evidence underlying his convictions, the appellant carries the burden of demonstrating to this court that no "rational trier of

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[6]Appellant's issue I.

fact" could have found the essential elements of first degree premeditated murder beyond a reasonable doubt for each count of the indictment. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982); Tenn. R. App. P. 13(e). This standard reflects the State's burden at trial of proving every essential element of a charged offense beyond a reasonable doubt, In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073 (1970); State v. Hall, 958 S.W.2d 679, 689-690 (1997); State v. Sensing, 843 S.W.2d 412, 417 (Tenn. 1992), while simultaneously allowing that "a guilty verdict 'removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt,'" State v. Ross, 49 S.W.3d 833, 844 (Tenn. 2001). In other words, all factual issues raised by the evidence, including questions concerning the credibility of witnesses and the weight and value to be given the evidence, are resolved by the trier of fact and not the appellate courts. State v. Pruett, 788 S.W.2d 559, 561 (Tenn. 1990). Accordingly, the State is entitled on appeal to the strongest legitimate view of the evidence and all reasonable inferences that may be drawn therefrom. State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). These principles apply to convictions based upon direct evidence, circumstantial evidence, or both. State v. Carruthers, 35 S.W.3d 516, 557 (Tenn. 2000), cert. denied, 533 U.S. 953, 121 S. Ct. 2600 (2001).

As relevant to the instant case, the legislature has defined first degree murder as "[a] premeditated and intentional killing of another." Tenn. Code Ann. § 39-13-202(a)(1) (1997). "[A] person . . . acts intentionally with respect to . . . a result of [his] conduct when it is the person's conscious objective or desire to . . . cause the result." Tenn. Code Ann. § 39-11-302(a) (1997); cf. State v. Ducker, 27 S.W.3d 889, 896 (Tenn. 2000), cert. denied, 531 U.S. 1197, 121 S. Ct. 1202 (2001). Premeditation, in turn,

> is an act done after the exercise of reflection and judgment. "Premeditation" means that the intent to kill must have been formed prior to the act itself. It is not necessary that the purpose to kill pre-exist in the mind of the accused for any definite period of time. The mental state of the accused at the time the accused allegedly decided to kill must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion as to be capable of premeditation.

Tenn. Code Ann. § 39-13-202(d).

The appellant did not deny at trial that he killed his children, nor does he deny killing his children in this appeal. Rather, the principal issue in the appellant's case has been his mental state at the time of these offenses. We have already noted that, at trial, the appellant presented testimony in support of the affirmative defense of insanity and, alternatively, the proposition that he did not possess the capacity at the time of the murders to form the requisite mental state for first degree premeditated murder. In his brief on appeal, the appellant appears to rely solely upon a claim of diminished capacity.

It is worthy of repetition that the State was required to prove premeditation, and therefore the exercise of reflection and judgment, beyond a reasonable doubt in order to obtain a conviction of first degree premeditated murder. State v. Hall, 8 S.W.3d 593, 599 (Tenn. 1999); Hall, 958 S.W.2d at 689; State v. Brown, 836 S.W.2d 530, 543 (Tenn. 1992); State v. Schafer, 973 S.W.2d 269, 274 (Tenn. Crim. App. 1997); see also Tenn. Code Ann. § 39-11-201(a)(2) (1997). In the absence of statutory definitions for the terms "reflection" and "judgment," we are left to interpret their natural and ordinary meanings within the

context of the entire statute. State v. Flemming, 19 S.W.3d 195, 197 (Tenn. 2000). In the context of the entire statute, their natural and ordinary meanings appear consistent with Webster's definitions of "reflection" as "a fixing of the thoughts on something" and "judgment" as "the forming of an opinion, estimate, notion, or conclusion, as from circumstances presented to the mind." Random House Webster's Unabridged Dictionary 1036 & 1620 (2d ed. 1998). Lest the State's burden of proof be removed in contravention of constitutional and statutory law, the rule of "diminished capacity" permitted the appellant to introduce expert testimony concerning the impact of any mental disease or defect upon his capacity to fix his thoughts upon murdering his children and form an opinion or conclusion thereon, i.e., an intent to kill, prior to the murders themselves. Hall, 958 S.W.2d at 688-690; State v. Abrams, 935 S.W.2d 399, 402 (Tenn. 1996); State v. Phipps, 883 S.W.2d 138, 149 (Tenn. Crim. App. 1994). Generally speaking, such testimony may warrant "an acquittal of the indicted offense and a conviction for a lesser included offense." State v. Perry, 13 S.W.3d 724, 734 (Tenn. Crim. App. 1999); see also Hall, 958 S.W.2d at 688.

In contesting the jury's finding of premeditation, the appellant emphasizes the experts' unanimous diagnosis that he was suffering major depression at the time of these offenses. The appellant also notes Dr. Kenner's opinion that, due to his depression, he was experiencing the delusion that his children's lives were sufficiently terrible to render death the preferable solution. Finally, he notes Dr. Martell's broad concession that major depression may affect a person's "judgment and thought processes." The difficulty faced by the appellant is the absence of any expert testimony that his depression rendered him incapable of premeditation, and Dr. Martell's testimony to the contrary. It was the jury's prerogative to accredit the State's expert witness. Perry, 13 S.W.3d at 734.

Moreover, even absent the State's expert witness, we have previously observed that expert testimony that, at the time of an offense, a defendant was suffering from a mental disease or defect affecting his ability to perceive reality "does not necessarily imply that the defendant lacked the capacity to premeditate." State v. Holder, 15 S.W.3d 905, 913 (Tenn. Crim. App. 1999); see also State v. Brian Val Kelley, No. M2001-00461-CCA-R3-CD, 2002 Tenn. Crim. App. LEXIS 424, at *60 (Nashville, May 7, 2002); State v. William Binkley, No. M2001-00404-CCA-R3-CD, 2002 Tenn. Crim. App. LEXIS 305, at **16-17 (Nashville, April 5, 2002); State v. Mabel J. Longmire, No. W1999-00216-CCA-R3-CD, 2001 Tenn. Crim. App. LEXIS 108, at *14 (Jackson, February 15, 2001), perm. to appeal denied, (Tenn. 2001). More specifically, we stated in Holder, 15 S.W.3d at 913, "This Court may not assume that a defendant suffering from paranoid schizophrenia accompanied by delusions is necessarily incapable of premeditated murder." Accordingly, we concluded that a rational trier of fact could have found beyond a reasonable doubt that the defendant was capable of premeditation despite the defendant's paranoid schizophrenia at the time of the offense and his consequent delusion that God had ordered him to kill the victim. Id. Similarly, in the recent case of Kelley, No. M2001-00461-CCA-R3-CD, 2002 Tenn. Crim. App. LEXIS 424, at *60, we approved a jury's verdict of guilt of first degree premeditated murder despite the unanimous opinion of experts that the defendant was suffering a severe mental disease or defect at the time of the offense and the defendant's consequent delusion that killing his daughter would "pave the way for Christ's second coming." Significantly, in finding evidence of premeditation in Kelley, we noted that the appellant "argued with God when he first received instructions to kill his child." Id. In sum, a criminal defendant may fix his thoughts upon murder and form an opinion or conclusion thereon prior to committing the murder although the facts upon which he bases his intent to kill are the product of delusions stemming from a mental illness or defect.

In any event, Dr. Auble conceded that the appellant expressed satisfaction at the death of his children when he was neither depressed, anxious, nor psychotic. Correspondingly, as noted by Dr. Martell, the appellant himself contradicted Dr. Kenner's theory of "altruistic murders" in his statements to the police, clearly indicating his desire for revenge against his ex-wife for dividing their family. A jury is not required to accept expert testimony to the exclusion of all other evidence. State v. Nesbit, 978 S.W.2d 872, 886 (Tenn. 1998); Holder, 15 S.W.3d at 912. Indeed, we have previously observed that;"'[o]ther than an accused stating what his or her purpose, intent, or thinking was at the relevant times, the trier of fact is left to determine the [requisite] mental state by making inferences from the surrounding circumstances it finds to exist.'" State v. Coulter, 67 S.W.3d 3, 72 (Tenn. Crim. App. 2001)(alteration in original). In this case, the appellant obliged the trier of fact by describing to police his intent, his motivation, and his extensive planning "at the relevant times." Of course, the appellant asserts that "[a]n examination of the entire life of Daryl Keith Holton reveals that the killing of his four (4) children by him was only something that would be done by him when he was not in control of . . . his ability to exercise reflection and judgment." We respectfully disagree. Circumstantial evidence, which includes the history of the appellant's relationship with his ex-wife and is exhaustively set forth above, was entirely consistent with the appellant's premeditation of his children's murders. Cf. State v. Nichols, 24 S.W.3d 297, 302 (Tenn. 2000); State v. Pike, 978 S.W.2d 904, 914 (Tenn. 1998); State v. Bland, 958 S.W.2d 651, 660 (Tenn. 1997); State v. Gentry, 881 S.W.2d 1, 4-5 (Tenn. Crim. App. 1993); State v. Anderson, 835 S.W.2d 600, 605 (Tenn. Crim. App. 1992).

The appellant seemingly declines in his brief to challenge the jury's rejection of his insanity defense. Nevertheless, in light of defense counsel's oral argument before this court, we will

briefly address the sufficiency of the evidence underlying the jury's finding. In doing so, we acknowledge that our supreme court is currently considering "[h]ow . . . the burden of proof on the issue of insanity affect[s] the standard of review [on appeal] of the jury's findings on insanity." State v. Christopher M. Flake, No. W2000-01131-SC-R11-CD, 2001 Tenn. LEXIS 886, at *1 n.1 (Jackson, December 17, 2001).

Tenn. Code Ann. § 39-11-501(a) (1997) provides that "[i]t is an affirmative defense to prosecution that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature or wrongfulness of such defendant's acts." The appellant carries the burden of proving insanity by clear and convincing evidence. Id. In determining the issue of insanity, as when determining a defendant's capacity to premeditate, "the trier of fact may consider both lay and expert testimony and may discount expert testimony which it finds to be in conflict with the facts of the case." Holder, 15 S.W.3d at 912.

Again, the experts in this case unanimously testified that, at the time of these offenses, the appellant was suffering from a mental disease or defect, albeit the experts debated the severity of the appellant's depression. Notwithstanding the experts' dispute, the appellant's own expert, Dr. Kenner, acknowledged that parents who suffer from major depression and commit filicide know that they are violating the law. The appellant's experts did not otherwise address the issue of insanity. In contrast, Dr. Martell testified that the appellant understood the nature of his actions, including the wrongfulness thereof, on November 30, 1997. Contrary to the appellant's suggestion in his brief, his belief that his actions were justified according to any subjective moral code, delusionary or otherwise, was not determinative of the issue of insanity. Kelley, No. M2001-00461-CCA-R3-CD, 2002 Tenn. Crim. App. LEXIS 424, at

**62-66; cf., e.g., State v. Corley, 495 P.2d 470, 472-473 (Ariz. 1972); People v. Serravo, 823 P.2d 128, 133-138 (Colo. 1992); State v. Wilson, 700 A.2d 633, 637-643 (Conn. 1997); State v. Worlock, 569 A 2d 1314, 1317-1322 (N.J. 1990). Finally, the appellant's actions or words before, at, and immediately after the commission of the offenses support the jury's verdicts. Holder, 15 S.W.3d at 912. This issue is without merit.

Constitutionality of Tenn. Code Ann. § 39-11-501 (1997)[7]

The appellant next contends that the statute setting forth the defense of insanity in Tennessee violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution in the specific context of a prosecution for first degree premeditated murder. Again, the challenged statute places the burden upon the defendant to prove by clear and convincing evidence that he was unable to appreciate the nature or wrongfulness of his actions at the time of the charged offense. Tenn. Code Ann. § 39-11-501(a) (1997). The appellant argues in essence that, because premeditation entails the exercise of reflection and judgment, it necessarily entails the ability to appreciate the nature or wrongfulness of one's actions, i.e., sanity. He concludes that, if premeditation entails sanity, then requiring a defendant to prove insanity by clear and convincing evidence shifts the burden of proof for an essential element of first degree premeditated murder from the State to the defendant.

Recently, in State v. Perry, 13 S.W.3d 724, 739 (Tenn. Crim. App. 1999), this court rejected a defendant's claim that Tenn. Code Ann. § 39-11-501 "unconstitutionally shifts the burden of proof to the defendant." However, we reached our conclusion in Perry in the context of a defendant's challenge to his conviction of second degree murder. Even so, we relied upon the United States Supreme Court's decision in Leland v. Oregon,

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[7]Appellant's issue IV.

343 U.S. 790, 72 S. Ct. 1002 (1952). In Leland, id. at 791-793, 72 S. Ct. at 1004-1005, an Oregon jury convicted the defendant of first degree murder pursuant to a statute requiring that the killing be done purposely and with deliberate and premeditated malice. The defendant challenged Oregon's statutory defense of insanity, which required that the defendant prove his inability to understand the wrongfulness of his act beyond a reasonable doubt. Id. at 792 & 800, 72 S. Ct. at 1004 & 1008. Specifically, the defendant argued

> that this statute in effect requires a defendant pleading insanity to establish his innocence by disproving beyond a reasonable doubt elements of the crime necessary to a verdict of guilty, and that the statute is therefore violative of that due process of law secured by the Fourteenth Amendment.

Id. at 793, 72 S. Ct. at 1004. The Supreme Court rejected the defendant's argument, id. at 799, 72 S. Ct. at 1007-1008, emphasizing that the trial court's instructions to the jury adequately distinguished the issues of the defendant's commission of the crime charged and the defense of insanity, id. at 795-796 & 800, 72 S. Ct. at 1006 & 1008. Notably, the Court disclaimed the significance of the degree of burden placed upon the defendant to its decision. Id. at 798, 72 S. Ct. at 1007; see also United States v. Amos, 803 F.2d 419, 421 (8th Cir. 1986)("The Supreme Court in Leland . . . held that a criminal defendant may, consistent with due process, be required to prove his [in]sanity beyond a reasonable doubt. It is axiomatic, therefore, that a lesser standard of proof, such as the clear and convincing standard, may be imposed."); cf. Cooper v. Oklahoma, 517 U.S. 348, 367-368, 116 S. Ct. 1373, 1383 (1996).

Following Leland, the Court has clarified that placing the burden of proving an affirmative defense upon a criminal defendant will only violate due process if proving the affirmative

defense necessarily negates any essential element of the offense. See, e.g., Patterson v. New York, 432 U.S. 197, 206-207, 97 S. Ct. 2319, 2325 (1977); Mullaney v. Wilbur, 421 U.S. 684, 686-687, 95 S. Ct. 1881, 1883-1884 (1975); see also Gall v. Parker, 231 F.3d 265, 286-287 (6th Cir. 2000); Wood v. Marshall, 790 F.2d 548, 550 (6th Cir. 1986). In State v. Holder, 15 S.W.3d 905, 911 (Tenn. Crim. App. 1999), in the context of a first degree murder prosecution, we remarked that "sanity is not an element of a crime." Correspondingly, we have already stated in this opinion that a criminal defendant may exercise reflection and judgment prior to committing a murder although the facts upon which he bases his decision to murder are the product of delusions stemming from a mental disease or defect. In this regard, we acknowledge our prior observations that an ability to understand the wrongfulness of one's acts suggests an ability to engage in some form of reflection and judgment. See, e.g., Holder, 15 S.W.3d at 913; State v. Mabel J. Longmire , No. W1999-00216-CCA-R3-CD, 2001 Tenn. Crim. App. LEXIS 108, at *14 (Jackson, February 15, 2001). However, we have never indicated that an ability to understand the wrongfulness of one's acts is necessary to the exercise of reflection and judgment. Finally, as in Leland, the trial court's charge to the jury in this case adequately distinguished the issues of the appellant's commission of the charged offenses and the defense of insanity. Accordingly, this issue is without merit.

Trial Conditions[8]

The appellant also argues that poor acoustics in the courtroom during his trial denied him the fair trial guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. In support of his argument, the appellant cites numerous instances in the record wherein the trial participants expressed difficulty hearing the proceedings.

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[8]Appellant's issue III.

Preliminarily, we note our supreme court's prior observation that the Fifth and Fourteenth Amendments to the United States Constitution guarantee a criminal defendant's right to a fair trial whereas the Sixth Amendment largely defines the basic elements of a fair trial. State v. Carruthers, 35 S.W.3d 516, 559 (Tenn. 2000)(citing Strickland v. Washington 466 U.S. 668, 684-685, 104 S. Ct. 2052, 2063 (1984)), cert. denied, 533 U.S. 953, 121 S. Ct. 2600 (2001). In any event, the appellant correctly observes that a fair trial entails a jury mentally and physically capable of hearing and deliberating upon the evidence adduced at trial, cf. Tenn. Code Ann. § 22-1-102 (1994); State v. Parton, 817 S.W.2d 28, 33 (Tenn. Crim. App. 1991), in addition to a defendant's receipt of the effective assistance of counsel. Moreover, "[o]ne of the most fundamental responsibilities of a trial court in a criminal case is to assure that a fair trial is conducted." State v. Franklin , 714 S.W.2d 252, 258 (Tenn. 1986); see also Parton, 817 S.W.2d at 35 (observing that, regardless of the actions of the litigants or lawyers, the trial judge has the responsibility to make sure that the appellant receives a proper jury trial and the effective assistance of counsel). To this end, the trial court has "broad discretion in controlling the course and conduct of the trial." State v. Caughron, 855 S.W.2d 526, 541 (Tenn. 1993); see also State v. King, 40 S.W.3d 442, 449 (Tenn. 2001); State v. Evans, 838 S.W.2d 185, 195 (Tenn. 1992).

The record reflects that all the trial participants, including the trial court, acknowledged the poor acoustics in the courtroom in which the appellant was tried. The record also reflects, however, that the trial court provided the following instruction to the jury at the trial's commencement:

> This, as you all know, is an extremely important matter to both the State of Tennessee and the defendant. It is extremely important that you be able to hear all of these proceedings.

> Consequently if during the course of the presentation of the evidence or the arguments or statements of counsel you are unable to hear any party, a witness, an attorney, or myself, please let me know. We will have that person adjust their volume or speech pattern in such a manner that you may hear all of the evidence in this case. Do not hesitate to raise your hand at any time you are unable to hear the proceedings. We will make whatever adjustments as are necessary to see that you can hear.

Moreover, the record reflects that, during the course of the appellant's trial, jurors in fact informed the court if they were having any difficulty hearing a witness' testimony, and the trial court admonished the witness accordingly. Also, the court made "technical adjustments" to the courtroom arrangement in order to assist participants in hearing the proceedings, including providing "special hearing devices" to jurors during the replay of audio tape recordings. Indeed, in denying the appellant's motion for new trial, the court reaffirmed that, "shortly after the beginning of the trial . . . I took control of the - - at least the amplification system and replaced the microphones and rearranged the courtroom which I think helped tremendously." Counsel for both the State and the appellant joined in the trial court's efforts to eliminate the impact of poor acoustics by periodically cautioning witnesses to speak loudly and occasionally asking that witnesses repeat testimony.

Absent from the record is any indication by the trial court or counsel that the poor acoustics in the courtroom rendered the performance of their respective duties impracticable. Also absent from the record is any indication that the jury missed any portion of the proceedings due to the poor acoustics. Notably, defense counsel at no time requested a mistrial on the basis of the poor acoustics. "At most, the record supports a conclusion that, at times, it was difficult to hear in the courtroom." People v.

Duff, 419 N.W.2d 600, 602 (Mich. Ct. App. 1987). The appellant nevertheless suggests the application of the principle announced by the United States Supreme Court in Estes v. Texas, 381 U.S. 532, 542-543, 85 S. Ct. 1628, 1632-1633 (1965), that, although "in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused[,] . . . at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process." Cf. also Holbrook v. Flynn, 475 U.S. 560, 568-572, 106 S. Ct. 1340, 1345-1348 (1986). We simply disagree that the courtroom arrangement in this case presented a case of inherent prejudice, much less actual prejudice. Cf. People v. Vaughn, 340 N.W.2d 310, 312 (Mich. Ct. App. 1983)("From the record it appears that the acoustic conditions in the courtroom were so intolerable and so interfered with the orderly conduct of the trial that defendant was denied a fair trial."). In short, the trial court properly exercised its discretion by taking the necessary steps to ensure that all participants could hear the proceedings. Accordingly, this issue is without merit.

The Constitutionality of the Death Penalty[9]

The appellant additionally asserts that the death penalty is violative of the fundamental right to life guaranteed by the United States and Tennessee Constitutions. Relying essentially upon substantive due process and equal protection principles, the appellant's argument is two-fold: (1) the death penalty never promotes a compelling state interest; and (2) even assuming the contrary, the State's pre-trial offer to the appellant of a sentence of life imprisonment in exchange for a guilty plea conclusively demonstrated the availability in his case of less intrusive means to promote the State's interest. As noted by the State, both this court and our supreme court have previously rejected similar

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[9]Appellant's issue II.

arguments. See State v. Mann, 959 S.W.2d 503, 517 & 536 (Tenn. 1997); State v. Bush, 942 S.W.2d 489, 507 & 523 (Tenn. 1997); Brimmer v. State, 29 S.W.3d 497, 531 (Tenn. Crim. App. 1998); Byron Lewis Black v. State, No. 01C01-9709-CR-00422, 1999 Tenn. Crim. App. LEXIS 324, at **73-74 (Nashville, April 8, 1999). The appellant is not, therefore, entitled to relief.

Review Mandated by Tenn. Code Ann. § 39-13-206(c) (1997)[10]

Pursuant to Tenn. Code Ann. § 39-13-206(c) (1997), this court must also make the following determinations: (1) whether the jury imposed sentences of death upon the appellant in an arbitrary fashion; (2) whether the evidence supports the jury's findings of statutory aggravating circumstance(s); (3) whether the evidence supports the jury's finding that the aggravating circumstance(s) outweigh(s) any mitigating circumstances; and (4) whether the sentences are excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant.

a. Review of Aggravating Circumstances

As noted earlier, with respect to all four counts of the indictment, the jury found the aggravating circumstance that the defendant committed "'mass murder,' which is defined as the murder of three (3) or more persons . . . committed during a single criminal episode." Tenn. Code Ann. § 39-13-204(i)(12) (1997). Additionally, with respect to Counts Two, Three, and Four, the jury found that the victims were less than twelve years of age and the defendant was eighteen years of age or older. Id. at (i)(1). Having reviewed the evidence supporting the jury's findings in a light most favorable to the State, we conclude that

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[10]Appellant's issues V and VI.

"'a rational trier of fact could have found the existence of the aggravating circumstance[s] beyond a reasonable doubt.'" State v. Keen, 31 S.W.3d 196, 205 (Tenn. 2000)(quoting State v. Henderson, 24 S.W.3d 307, 313 (Tenn. 2000)), cert. denied, 532 U.S. 907, 121 S. Ct. 1233 (2001). Indeed, the appellant has never disputed their applicability.

b. Review of the Jury's Weighing of Aggravating and Mitigating Circumstances

Our review of mitigating evidence presented on behalf of the appellant during the sentencing phase of his trial and contained in the record of the guilt/innocence phase further convinces us that a rational trier of fact could have imposed sentences of death for all four counts of first degree premeditated murder. Specifically, with respect to Count One of the indictment, a rational trier of fact could have concluded beyond a reasonable doubt that the appellant's commission of mass murder outweighs any mitigating circumstances. It follows that, with respect to the remaining counts, a rational trier of fact could have concluded beyond a reasonable doubt that the appellant's commission of mass murder in addition to the respective ages of the victims and the appellant outweigh any mitigating circumstances.

i. Mitigating Circumstances Generally

Much of the evidence upon which the appellant relied during the sentencing phase of his trial afforded little mitigation. For example, the appellant's lack of any significant history of prior criminal activity was undercut by his past physical abuse of his ex-wife. As to his ex-wife's neglect of their children, the appellant himself enabled his wife's alcoholism and, despite her neglect, recommended to the Bedford County Juvenile Court in 1996 that she retain custody of the children. The appellant's own relationship with his children prior to the murders merely

rendered them vulnerable to his offenses. With respect to his depression, his expressions to police of malice toward his ex-wife constituted more convincing evidence of motive than Dr. Kenner's theory of "altruistic murders." Moreover, the appellant's behavior in jail pending trial and even his military service could hardly be said to outweigh or counterbalance the mass murder of his children, three of whom were less than twelve years of age.

ii. Residual Doubt

In approving the jury's weighing of aggravating and mitigating circumstances, we note the appellant's assertion that residual doubt warranted a sentence of life imprisonment. "'Residual doubt evidence,' in general, . . . consist[s] of proof admitted during the sentencing phase [of capital proceedings] that indicates the defendant did not commit the offense, notwithstanding the jury's verdict following the guilt phase." State v. Timothy McKinney, __ S.W.3d __, No. W1999-00844-SC-DDT-DD, 2002 Tenn. LEXIS 155, at *30 (Jackson, March 26, 2002); see also Tenn. Code Ann. § 39-13-204(c) (1997). Moreover, in arguing to the jury during the sentencing phase, a defendant may refer to evidence from the guilt/innocence phase creating residual doubt. McKinney, __ S.W.3d __, No. W1999-00844-SC-DDT-DD, 2002 Tenn. LEXIS 155, at *33 . The appellant in this case did not present evidence of residual doubt during the sentencing phase; however, in arguing to the jury, he did emphasize once again evidence relating to his mental state at the time of these offenses. On appeal, he essentially reiterates his challenge to the sufficiency of the evidence underlying the jury's verdicts of guilt and his challenge to the constitutionality of the statute setting forth the defense of insanity. As we have already suggested, the evidence adduced during the guilt/innocence phase of the appellant's trial overwhelmingly supports the jury's verdicts of guilt, and we decline to revisit the constitutionality of Tenn. Code Ann. § 39-11-501 (1997).

iii. Zagorski

The appellant further asserts that, in assessing residual doubt and the jury's weighing of aggravating and mitigating circumstances, we must consider the appellant's refusal to follow counsel's advice during the sentencing phase and present mitigating evidence relating to the abandonment of his children by Ms. Holton and the consequent "burden placed upon [him]." Yet, abundant evidence of both Ms. Holton's deficiencies as a mother and the appellant's relationship with his children was presented to the jury during the guilt/innocence phase of the appellant's trial. "[G]iven that this was not a resentencing hearing, the reality is that the sentencing jury had already heard the [proposed] testimony . . . and had reconciled it in favor of the State's theory of guilt and against the defendant's theory of innocence." State v. Timothy McKinney, __ S.W.3d __, No. W1999-00844-SC-DDT-DD, 2002 Tenn. LEXIS 155, at *35 (Jackson, March 26, 2002). Even more importantly, perhaps, it is well-established that a criminal defendant has the exclusive authority to make substantive decisions concerning the presentation of his defense. See Zagorski v. State, 983 S.W.2d 654, 658 (Tenn. 1998); see also Tenn. Sup. Ct. R. 8, EC 7-7, 7-8. This authority encompasses the decision to forego the presentation of mitigating evidence during the sentencing phase of capital proceedings, and a defendant's subsequent expressions of doubt about the wisdom of his decision will not afford him relief. Zagorski, 983 S.W.2d at 658-659; State v. Michael D. Rimmer, No. W1999-00637-CCA-R3-DD, 2001 Tenn. Crim. App. LEXIS 399, at **19-22 (Jackson, May 25, 2001).

We also note that both defense counsel and the trial court followed the procedures set forth by the supreme court in Zagorski for the purpose of "insuring that the accused has intelligently and voluntarily made a decision to forego mitigating evidence." 983 S.W.2d at 660-661. In particular, we note the appellant's confirmation to the trial court that it was his "free and

voluntary decision to forego the presentation of . . . additional mitigating evidence." Moreover, defense counsel noted to the trial court that "[t]here is nothing at this time that would indicate to us that Mr. Holton . . . is not able to make his decisions." We reiterate the absence of any evidence in the record of incompetency notwithstanding numerous evaluations of the appellant by mental health professionals. In the context of the appellant's knowing and voluntary decision to forego the presentation of mitigating evidence, we are unable to say that the jury improperly weighed the evidence before it in imposing sentences of death.

c. Arbitrariness and Proportionality

Our review of the record also reveals the trial court's and the jury's substantial compliance with Tenn. Code Ann. § 39-13-204 (1997) and a consequent lack of arbitrariness in the jury's imposition of sentences of death. Moreover, our comparative proportionality review, yet another "'check against the random or arbitrary imposition of the death penalty,'" leaves the jury's sentencing determinations undisturbed. State v. Godsey, 60 S.W.3d 759, 781 (Tenn. 2001). The latter conclusion, however, requires a somewhat more detailed discussion.

We begin our comparative proportionality review with the presumption that the death penalty is proportionate to the crime of first degree murder. Godsey, 60 S.W.3d at 781; State v. Henderson, 24 S.W.3d 307, 315 (Tenn. 2000); State v. Bland, 958 S.W.2d 651, 662 (Tenn. 1997). However, "[i]f the case, taken as a whole, is plainly lacking in circumstances consistent with those in similar cases in which the death penalty has been imposed, the sentence of death in the case being reviewed is disproportionate." Bland, 958 S.W.2d at 665 & 668; see also Godsey, 60 S.W.3d at 782; State v. Keen, 31 S.W.3d 196, 220 (Tenn. 2000), cert. denied, 532 U.S. 907, 121 S. Ct. 1233 (2001).

Conversely, we are not required to find that a jury has never imposed a sentence less than death in a case involving a similar murder or even a more atrocious murder. Godsey, 60 S.W.3d at 784; Henderson, 24 S.W.3d at 315; State v. Smith, 993 S.W.2d 6, 21 (Tenn. 1999). In other words, "the isolated decision of a jury to afford mercy does not render a death sentence disproportionate." Smith, 993 S.W.2d at 21; see also Godsey, 60 S.W.3d at 784-785; Keen, 31 S.W.3d at 222.[11] "[O]ur [exclusive] duty 'is to assure that no aberrant death sentence is affirmed.'" Henderson, 24 S.W.3d at 315. In performing our duty, we look at a pool of cases in Tennessee including all "those cases in which a capital sentencing hearing was actually conducted to determine whether the sentence should be life imprisonment, life imprisonment without the possibility of parole, or death . . . , regardless of the sentence actually imposed." Bland, 958 S.W.2d at 666; see also Godsey, 60 S.W.3d at 783-786. In selecting similar cases, we examine the application of aggravating and mitigating circumstances and otherwise compare the characteristics of both offenses and defendants. Bland, 958 S.W.2d at 667; Tenn. Code Ann. § 39-13-206(c)(1)(D) (1997).

Characteristics relevant to the identification and comparison of similar offenses include the following: (1) the means of death; (2) the manner of death (i.e., whether the death was violent, torturous, etc.); (3) the motivation for the killing; (4) the place of death; (5) the similarity of the victims' circumstances, including age, physical and mental conditions, and the victims' treatment during the killing; (6) the absence or

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[11]Thus, even assuming the cases are comparable, we reject any implication in the appellant's brief that the jury's imposition of life sentences in State v. James Christopher Tatrow, No. 03C01-9707-CR-00299, 1998 Tenn. Crim. App. LEXIS 1169 (Knoxville, November 2, 1998), requires a finding of disproportionality in this case.

presence of premeditation; (7) the absence or presence of provocation; (8) the absence or presence of justification; and (9) the injury to and effects of the murder on nondecedent victims. Bland, 958 S.W.2d at 667. Characteristics relevant to the identification and comparison of similar defendants include the following: (1) the defendant's prior criminal record or prior criminal activity; (2) the defendant's age, race, and gender; (3) the defendant's mental, emotional, or physical condition; (4) the defendant's involvement or role in the murder; (5) the defendant's cooperation with authorities; (6) the defendant's remorse; (7) the defendant's knowledge of the helplessness of the victim(s); and (8) the defendant's capacity for rehabilitation. Id. These factors are not exhaustive, and the reviewing court may consider other characteristics or factors in comparing the characteristics of the offense and the appellant in this case with offenses and defendants in the pool of cases. Keen, 31 S.W.3d at 220.

Briefly summarizing, the appellant was a thirty-six-year-old, highly intelligent white male who killed his four children. The children ranged in age from four years old to twelve years old. The appellant apparently had a close relationship with his children but had also previously contemplated murdering them and thoroughly premeditated the instant offenses. He played upon his children's trust in him to commit the offenses, killing his children by shooting them repeatedly with an SKS semi-automatic rifle at the automobile repair garage where he lived and worked. The appellant also contemplated murdering the daughter of his ex-wife's boyfriend and firebombing his ex-wife's home but lacked sufficient time. The appellant ultimately surrendered to police and confessed to his crimes. Notwithstanding the appellant's history of depression and his depression at the time of these offenses, he admitted to murdering his children in order to "shock" his ex-wife. The appellant also admitted that he entertained no regret or remorse

for his actions. Finally, the appellant had previously served in the military, and his history of prior criminal activity consisted primarily of physically abusing his ex-wife.

Several first degree murders in Tennessee involving multiple victims including children have resulted in sentences of death. For example, in State v. Black, 815 S.W.2d 166 (Tenn. 1991), the defendant shot and killed his girlfriend and her six- and nine-year-old daughters in their home. The evidence adduced at trial indicated that the defendant was motivated by his anger at his girlfriend's attempts to reconcile with her ex-husband, who was also the father of her daughters. At the time of the murders, the defendant was on a weekend furlough from the Metropolitan Workhouse in Davidson County pursuant to his conviction for a prior shooting. He denied any involvement in the murders. Nevertheless, a jury found him guilty of the first degree premeditated murder of each victim, imposing a sentence of death for the murder of the six-year-old child and sentences of life imprisonment for the two remaining murders. In addition to the defendant's commission of mass murder and the respective ages of the victim and the defendant, the jury considered the following aggravating factors: the appellant's prior conviction of one or more violent felonies; the heinous, atrocious, or cruel nature of the murder; the commission of the murder to avoid arrest or prosecution; and the commission of the murder during the perpetration of another, statutorily designated felony. In mitigation, the defendant presented the testimonies of a former teacher, friends, and family members that the defendant had been "a good student, a good father, a good provider, a responsible, polite, friendly, helpful, and nonviolent person." He also proffered testimony concerning his religious conversion since the offenses and his good behavior in jail pending trial.

In State v. Smith, 868 S.W.2d 561 (Tenn. 1993), the defendant was a thirty-nine-year-old white male of "medium" intelligence who killed his estranged wife and her thirteen- and sixteen-year-old sons from a previous marriage. The evidence adduced at trial indicated that the defendant was angered by his separation from his wife. He had previously assaulted the victims and, in fact, was facing charges for aggravated assault at the time of the murders. In committing the murders, he both shot and stabbed the victims. The defendant's own children by his estranged wife were unharmed. The defendant denied committing the murders. Nevertheless, a jury found him guilty of the first degree premeditated murder of each victim and imposed a sentence of death for each murder. Specifically, the jury found that the defendant's murders of his wife and step-sons were aggravated by the heinous, atrocious, or cruel nature of the murders and the defendant's commission of mass murder. Moreover, the jury found that the defendant's murders of his step-sons were committed for the purpose of avoiding arrest or prosecution and were committed during the perpetration of another, statutorily designated felony. In mitigation, the defendant presented the testimony of co-workers that he was a good employee, and personnel and an inmate from the Davidson County Jail testified that he was a good prisoner. His family also related that the defendant had a mentally retarded son who depended emotionally upon his father. Finally, the defendant proffered proof of a history of mental health problems, and a psychologist testified that the defendant suffered from paranoid personality disorder, chronic depressive neurosis, and paranoid delusional disorder.

In State v. Payne, 791 S.W.2d 10 (1990), the defendant was a twenty-year-old black male of "medium" intelligence who stabbed to death his girlfriend's twenty-eight-year-old neighbor and the neighbor's two-and-one-half-year-old daughter. The defendant also assaulted the neighbor's three-and-one-half-year-

old son, but the child survived. The defendant's motive was unclear, but evidence adduced at trial suggested that he made sexual advances toward his girlfriend's neighbor and, upon encountering resistance, assaulted her with a butcher knife. The evidence adduced at trial also suggested that, at the time of the offenses, the defendant was under the influence of cocaine or intoxicated from drinking beer or Geritol. The defendant denied guilt. Nevertheless, a jury convicted him of two counts of first degree premeditated murder and one count of assault with intent to commit first degree murder. The jury imposed a death sentence for each murder conviction, finding that the defendant knowingly created a great risk of death to two or more persons other than the victim and that the murders were heinous, atrocious, or cruel. Also, in sentencing the defendant for the murder of the two-and-one-half-year-old child, the jury considered the age of the victim and the age of the defendant. The defendant had no significant history of prior criminal activity.

Other cases in Tennessee involving the murder of a child, but not mass murder, and resulting in the imposition of a death sentence have included evidence of child abuse or rape. See, e.g., Keen, 31 S.W.3d at 196; State v. Vann, 976 S.W.2d 93 (Tenn. 1998); State v. Irick, 762 S.W.2d 121 (Tenn. 1988); State v. Coe , 655 S.W.2d 903 (Tenn. 1983). Perhaps a more comparable case is State v. Van Tran , 864 S.W.2d 465 (Tenn. 1993), a case involving the mass murder of adults. The defendant was a twenty-one-year-old Asian male of "medium" or below average intelligence[12] who participated in the armed

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[12]In Van Tran v. State, 66 S.W.3d 790, 793 n.3 (Tenn. 2001), our supreme court noted that, at the defendant's original 1989 trial, "evidence was introduced to show that the petitioner had below average intellectual functioning, but no standardized test was administered, and there was no

(continued...)

robbery of a Chinese restaurant, during which robbery three people were killed. Two of the victims were shot in the back of the head in "execution style" murders. The third victim was shot eight times after struggling with his assailants. The defendant cooperated with law enforcement authorities, confessing to police his participation in the robbery and further confessing to shooting at least two of the victims. Evidence adduced at trial suggested that he may have been under the influence of drugs or alcohol at the time of the offenses. A jury convicted the defendant of three counts of first degree felony murder and imposed sentences of death for each murder. In imposing sentences of death, the jury relied upon both the heinous atrocious and cruel nature of the murders and the defendant's commission of mass murder.[13] In mitigation, the defendant adduced evidence of his childhood in Viet Nam, his lack of education, his susceptibility to peer pressure, and his remorse for his offenses. The defendant had no significant prior history of criminal activity.

No two cases are identical with respect to either circumstances or defendants. Henderson, 24 S.W.3d at 315.

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[12](...continued)
evidence introduced as to his intelligence quotient." However, the Rule 12 report from the defendant's original trial reflects a "medium" intelligence level. In any event, the supreme court in Van Tran, 66 S.W.3d at 812, concluded that the execution of the mentally retarded violates the Eighth Amendment to the United States Constitution and Article I, Section 16 of the Tennessee Constitution, in part because the execution of the mentally retarded constitutes grossly disproportionate punishment, and remanded the defendant's case to the trial court for a determination of whether he is in fact mentally retarded.

[13]In Van Tran, 864 S.W.2d at 480, the supreme court reversed two of the defendant's death sentences and remanded his case for re-sentencing on the basis of the State's failure to establish the heinous, atrocious, or cruel nature of the murders.

With that in mind and after reviewing the cases discussed above and many other cases not herein detailed, we are of the opinion that the sentences imposed by the jury in this case are not disproportionate to the penalties imposed in similar cases.

III. Conclusion

In summary, following a careful and extensive review of the record and the parties' briefs and upon making the determinations required by Tenn. Code Ann. § 39-13-206(c)(1) (1997), we affirm both the appellant's convictions of first degree premeditated murder and his sentences of death.

NORMA McGEE OGLE, JUDGE

Appendix C

Order Denying Petition for Rehearing
Dated February 17, 2004

A-105

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

October 3, 2003 Session

Heard at Murfreesboro

STATE OF TENNESSEE v. DARYL KEITH HOLTON

Circuit Court for Bedford County

No. 14302 William Charles Lee, Judge

NO. M2000-00766-SC-DDT-DD

ORDER

Daryl Keith Holton, by and through counsel, has filed a petition to rehear the opinion of this Court filed on January 5, 2004. Upon due consideration, the petition is DENIED.

Justice Birch continues to adhere to the views expressed in his initial concurring and dissenting opinion.

PER CURIAM

Appendix D

Relevant Tennessee Statutes

§ 39-13-201. Criminal homicide

Criminal homicide is the unlawful killing of another person which may be first degree murder, second degree murder, voluntary manslaughter, criminally negligent homicide or vehicular homicide.

§ 39-13-202. First degree murder

(a) First degree murder is:

(1) A premeditated and intentional killing of another;

(2) A killing of another committed in the perpetration of or attempt to perpetrate any first degree murder, act of terrorism, arson, rape, robbery, burglary, theft, kidnapping, aggravated child abuse, aggravated child neglect or aircraft piracy; or

(3) A killing of another committed as the result of the unlawful throwing, placing or discharging of a destructive device or bomb.

(b) No culpable mental state is required for conviction under subdivision (a)(2) or (a)(3) except the intent to commit the enumerated offenses or acts in such subdivisions.

(c) A person convicted of first degree murder shall be punished by:

(1) Death;

(2) Imprisonment for life without possibility of parole; or

(3) Imprisonment for life.

(d) As used in subdivision (a)(1) "premeditation" is an act done after the exercise of reflection and judgment. "Premeditation" means that the intent to kill must have been formed prior to the act itself. It is not necessary that the purpose to kill pre-exist in the mind of the accused for any definite period of time. The

mental state of the accused at the time the accused allegedly decided to kill must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion as to be capable of premeditation.

§ 39-13-204. First degree murder; sentencing; factors

(a) Upon a trial for first degree murder, should the jury find the defendant guilty of first degree murder, it shall not fix punishment as part of the verdict, but the jury shall fix the punishment in a separate sentencing hearing to determine whether the defendant shall be sentenced to death, to imprisonment for life without possibility of parole, or to imprisonment for life. The separate sentencing hearing shall be conducted as soon as practicable before the same jury that determined guilt, subject to the provisions of subsection (k) relating to certain retrials on punishment.

(b) In the sentencing proceeding, the attorney for the state shall be allowed to make an opening statement to the jury and then the attorney for the defendant shall also be allowed such statement; provided, that the waiver of opening statement by one party shall not preclude the opening statement by the other party.

(c) In the sentencing proceeding, evidence may be presented as to any matter that the court deems relevant to the punishment and may include, but not be limited to, the nature and circumstances of the crime; the defendant's character, background history, and physical condition; any evidence tending to establish or rebut the aggravating circumstances enumerated in subsection (i); and any evidence tending to establish or rebut any mitigating factors. Any such evidence which the court deems to have probative value on

the issue of punishment may be received regardless of its admissibility under the rules of evidence; provided, that the defendant is accorded a fair opportunity to rebut any hearsay statements so admitted. However, this subsection (c) shall not be construed to authorize the introduction of any evidence secured in violation of the constitution of the United States or the constitution of Tennessee. In all cases where the state relies upon the aggravating factor that the defendant was previously convicted of one (1) or more felonies, other than the present charge, whose statutory elements involve the use of violence to the person, either party shall be permitted to introduce evidence concerning the facts and circumstances of the prior conviction. Such evidence shall not be construed to pose a danger of creating unfair prejudice, confusing the issues, or misleading the jury and shall not be subject to exclusion on the ground that the probative value of such evidence is outweighed by prejudice to either party. Such evidence shall be used by the jury in determining the weight to be accorded the aggravating factor. The court shall permit a member or members, or a representative or representatives of the victim's family to testify at the sentencing hearing about the victim and about the impact of the murder on the family of the victim and other relevant persons. Such evidence may be considered by the jury in determining which sentence to impose. The court shall permit members or representatives of the victim's family to attend the trial, and those persons shall not be excluded because the person or persons shall testify during the sentencing proceeding as to the impact of the offense.

(d) In the sentencing proceeding, the state shall be allowed to make a closing argument to the jury; and then the attorney for the defendant shall also be allowed such argument, with the state having the right of closing.

(e)(1) After closing arguments in the sentencing hearing, the trial judge shall include in the instructions for the jury to weigh and consider any of the statutory aggravating circumstances set forth in subsection (i) which may be raised by the evidence at either the guilt or sentencing hearing, or both. The trial judge shall also include in the instructions for the jury to weigh and consider any mitigating circumstances raised by the evidence at either the guilt or sentencing hearing, or both, which shall include, but not be limited to, those circumstances set forth in subsection (j). These instructions and the manner of arriving at a sentence shall be given in the oral charge and in writing to the jury for its deliberations. However, a reviewing court shall not set aside a sentence of death or of imprisonment for life without the possibility of parole on the ground that the trial court did not specifically instruct the jury as to a requested mitigating factor that is not enumerated in subsection (j).

(2) The trial judge shall provide the jury three (3) separate verdict forms, as specified by subdivisions (f)(1), (f)(2), and (g)(2)(B). The jury shall be instructed that a defendant who receives a sentence of imprisonment for life shall not be eligible for parole consideration until the defendant has served at least twenty-five (25) full calendar years of such sentence. The jury shall also be instructed that a defendant who receives a sentence of imprisonment for life without possibility of parole shall never be eligible for release on parole.

(f)(1) If the jury unanimously determines that no statutory aggravating circumstance has been proven by the state beyond a reasonable doubt, the sentence shall be imprisonment for life. The jury shall then return its verdict to the judge upon a form provided by the court which may appear substantially as follows:

PUNISHMENT OF IMPRISONMENT FOR LIFE

We, the jury, unanimously determine that no statutory aggravating circumstance has been proven by the state beyond a reasonable doubt. We, the jury, therefore find that the sentence shall be imprisonment for life.

/s/ _____ / s /
_____

Jury Foreperson Juror

/s/ _____ / s /
_____

Juror Juror

/s/ _____ / s /
_____

Juror Juror

/s/ _____ / s /
_____

Juror Juror

/s/ _____ / s /
_____

Juror Juror

/s/ _____ / s /
_____

Juror Juror

(2) If the jury unanimously determines that a statutory aggravating circumstance or circumstances have been proven by the state beyond a reasonable doubt, but that such circumstance or circumstances have not been proven by the state to outweigh any mitigating circumstance or circumstances beyond a reasonable doubt, the jury shall, in its considered discretion, sentence the defendant either to imprisonment for life without possibility of parole or imprisonment for life. The trial judge shall instruct the jury that, in choosing between the sentences of imprisonment for life without possibility of parole and imprisonment for life, the jury shall weigh and consider the statutory aggravating circumstance or circumstances proven by the state beyond a reasonable doubt and any mitigating circumstance or circumstances. In its verdict, the jury shall specify the statutory aggravating circumstance or circumstances proven by the state beyond a reasonable doubt and shall return its verdict to the judge upon a form provided by the court which may appear substantially as follows:

PUNISHMENT OF IMPRISONMENT FOR LIFE WITHOUT POSSIBILITY OF PAROLE OR

IMPRISONMENT FOR LIFE

We, the jury, unanimously find that the state has proven the following listed statutory aggravating circumstance or circumstances beyond a reasonable doubt:

[Here list the statutory aggravating circumstance or circumstances so found.]

We, the jury, unanimously find that such statutory aggravating circumstance or circumstances do not outweigh any mitigating circumstance or circumstances beyond a reasonable doubt; therefore:

CHECK ONE (1) BOX ONLY

[ ] We, the jury, unanimously agree that the defendant shall be sentenced to imprisonment for life without possibility of parole; or

[ ] We, the jury, unanimously agree that the defendant shall be sentenced to imprisonment for life.

/s/ _____ / s /

_____

Jury Foreperson Juror

/s/ _____ / s /

_____

Juror Juror

/s/ _____ / s /

_____

Juror Juror

/s/ _____ / s /

_____

Juror Juror

/s/ _____ / s /

_____

Juror Juror

/s/ _____ / s /

_____

Juror Juror

(g)(1) If the jury unanimously determines that:

(A) At least one (1) statutory aggravating circumstance or several statutory aggravating circumstances have been proven by the state beyond a reasonable doubt; and

(B) Such circumstance or circumstances have been proven by the state to

outweigh any mitigating circumstances beyond a reasonable doubt;

then the sentence shall be death.

(2)(A) If the death penalty is the sentence of the jury, the jury shall:

(i) Reduce to writing the statutory aggravating circumstance or statutory aggravating circumstances so found; and

(ii) Signify that the state has proven beyond a reasonable doubt that the statutory aggravating circumstance or circumstances outweigh any mitigating circumstances.

(B) These findings and verdict shall be returned to the judge upon a form provided by the court which may appear substantially as follows:

PUNISHMENT OF DEATH

We, the jury, unanimously find the following listed statutory aggravating circumstance or circumstances:

[Here list the statutory aggravating circumstance or circumstances so found.]

We, the jury, unanimously find that the state has proven beyond a reasonable doubt that the statutory aggravating circumstance or circumstances outweigh any mitigating circumstances.

Therefore, we, the jury, unanimously find that the punishment shall be death.

/s/ _____ / s /
_____

Jury Foreperson Juror

/s/ _____ / s /
_____

Juror Juror

/s/ _____ / s /
_____

Juror Juror

/s/ _____ / s /
_____

Juror Juror

/s/ _____ / s /
_____

Juror Juror

/s/ _____ / s /
_____

Juror Juror

(h) If the jury cannot ultimately agree on punishment, the trial judge shall inquire of the foreperson of the jury whether the jury is divided over imposing a sentence of death. If the jury is divided over imposing a sentence of death, the judge shall instruct the jury that in further deliberations, the jury shall only consider the sentences of imprisonment for life without possibility of parole and imprisonment for life. If, after further deliberations, the jury still cannot agree as to sentence, the trial judge shall dismiss the jury and such judge shall impose a sentence of imprisonment for life. The judge shall not instruct the jury, nor shall the attorneys be permitted to comment at any time to the jury, on the effect of the jury's failure to agree on a punishment.

(i) No death penalty or sentence of imprisonment for life without possibility of parole shall be imposed but upon a unanimous finding that the state has proven beyond a reasonable doubt the existence of one (1) or more of the statutory aggravating circumstances, which are limited to the following:

(1) The murder was committed against a person less than twelve (12) years of age and the defendant was eighteen (18) years of age, or older;

(2) The defendant was previously convicted of one (1) or more felonies, other than the present charge, whose statutory elements involve the use of violence to the person;

(3) The defendant knowingly created a great risk of death to two (2) or more persons, other than the victim murdered, during the act of murder;

(4) The defendant committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;

(5) The murder was especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death;

(6) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another;

(7) The murder was knowingly committed, solicited, directed, or aided by the defendant, while the defendant had a substantial role in committing or attempting to commit, or was fleeing after having a substantial role in committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, theft, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb;

(8) The murder was committed by the defendant while the defendant was in lawful custody or in a place of lawful confinement or during the defendant's escape from lawful custody or from a place of lawful confinement;

(9) The murder was committed against any law enforcement officer, corrections official, corrections employee, emergency medical or rescue worker, emergency medical technician, paramedic or firefighter, who was engaged in the performance of official duties, and the defendant knew or reasonably should have known that such victim was a law enforcement officer, corrections official, corrections employee, emergency medical or rescue worker, emergency medical technician, paramedic or firefighter engaged in the performance of official duties;

(10) The murder was committed against any present or former judge, district attorney general or state attorney general, assistant district attorney general or assistant state attorney general due to or because of the exercise of the victim's official duty or status and the defendant knew that the victim occupied such office;

(11) The murder was committed against a national, state, or local popularly elected official, due to or because of the official's

lawful duties or status, and the defendant knew that the victim was such an official;

(12) The defendant committed "mass murder," which is defined as the murder of three (3) or more persons whether committed during a single criminal episode or at different times within a forty-eight-month period;

(13) The defendant knowingly mutilated the body of the victim after death;

(14) The victim of the murder was seventy (70) years of age or older; or the victim of the murder was particularly vulnerable due to a significant handicap or significant disability, whether mental or physical, and at the time of the murder the defendant knew or reasonably should have known of such handicap or disability; or

(15) The murder was committed in the course of an act of terrorism.

(j) In arriving at the punishment the jury shall consider, as heretofore indicated, any mitigating circumstances which shall include, but are not limited to, the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The murder was committed under circumstances which the defendant reasonably believed to provide a moral justification for the defendant's conduct;

(5) The defendant was an accomplice in the murder committed by another person and the defendant's participation was relatively minor;

(6) The defendant acted under extreme duress or under the substantial domination of another person;

(7) The youth or advanced age of the defendant at the time of the crime;

(8) The capacity of the defendant to appreciate the wrongfulness of the defendant's conduct or to conform the defendant's conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected the defendant's judgment; and

(9) Any other mitigating factor which is raised by the evidence produced by either the prosecution or defense at either the guilt or sentencing hearing.

(k) Upon motion for a new trial, after a conviction of first degree murder, if the court finds error in the trial determining guilt, a new trial on both guilt and sentencing shall be held, but if the court finds error alone in the trial determining punishment, a new trial on the issue of punishment alone shall be held by a new jury empanelled for such purpose. If the trial court, or any other court with jurisdiction to do so, orders that a defendant convicted of first degree murder (whether the sentence is death, imprisonment for life without possibility of parole or imprisonment for life) be granted a new trial, either as to guilt or punishment, or both, the new trial shall include the possible punishments of death, imprisonment for life without possibility of parole or imprisonment for life.

§ 39-13-206. Appeal and review; capital punishment

(a)(1) Whenever the death penalty is imposed for first degree murder and when the judgment has become final in the trial

court, the defendant shall have the right of direct appeal from the trial court to the court of criminal appeals. The affirmance of the conviction and the sentence of death shall be automatically reviewed by the Tennessee supreme court. Upon the affirmance by the court of criminal appeals, the clerk shall docket the case in the supreme court and the case shall proceed in accordance with the Tennessee Rules of Appellate Procedure.

(2) If the defendant has been convicted of first degree murder and sentenced to death and appeals that conviction and sentence, the record as to guilt and sentence shall be expeditiously filed with the court of criminal appeals within the time limit provision of Tennessee Rules of Appellate Procedure, Rules 24 and 25. If the defendant has been convicted of first degree murder and sentenced to death but does not appeal the conviction of first degree murder, then the trial court shall certify, within ninety (90) days after the judgment has become final, the record relating to punishment, and the same shall be transmitted by the clerk of the trial court to the court of criminal appeals. If the defendant has been convicted of other crimes at the same trial wherein a death sentence is imposed, the court of criminal appeals shall have authority to review by direct appeal such other crimes if appealed by the defendant with the conviction of first degree murder and sentence of death.

(b) The appeal of the conviction of first degree murder and the review of the sentence of death shall have priority over all other cases and shall be heard according to the rules promulgated by the Tennessee supreme court. The reviewing courts shall first consider any errors assigned and then the courts shall review the sentence of death.

(c)(1) In reviewing the sentence of death for first degree murder, the reviewing courts shall determine whether:

(A) The sentence of death was imposed in any arbitrary fashion;

(B) The evidence supports the jury's finding of statutory aggravating circumstance or circumstances;

(C) The evidence supports the jury's finding that the aggravating circumstance or circumstances outweigh any mitigating circumstances; and

(D) The sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant.

(2) The Tennessee supreme court may promulgate rules as it deems appropriate to establish such procedures as are necessary to enable the reviewing courts to properly review the death sentence.

(d) In addition to its other authority regarding correction of errors, the court of criminal appeals and the Tennessee supreme court, in reviewing the death sentence for first degree murder, are authorized to:

(1) Affirm the sentence of death; or

(2) Modify the punishment to imprisonment for life without possibility of parole or imprisonment for life.

(e) In the event that any provision of §§ 39-13-202 - 39-13-205, or this section or the application thereof to any individual or circumstance is held to be invalid or unconstitutional so as to permanently preclude a sentence of death as to that individual, the court having jurisdiction over such individual previously sentenced to death shall cause such individual to be brought before the proper court which shall, following a sentencing hearing conducted in accordance with § 39-13-207, sentence

such person to imprisonment for life without possibility of parole or imprisonment for life.

Appendix E

Indictment

STATE OF TENNESSEE
BEDFORD COUNTY

JANUARY SESSION 1998, CRIMINAL COURT
APRIL 20, 1998

COUNT ONE

THE GRAND JURORS of BEDFORD County, Tennessee, duly impaneled and sworn, upon their oath, present that:

DARYL KEITH HOLTON

on or about the 30TH DAY OF NOVEMBER, 1997, in BEDFORD County, Tennessee and before the finding of this indictment, intentionally, deliberately and with premeditation did kill STEPHEN EDWARD HOLTON, AGE 12, in violation of Tennessee Code Annotated §39-13-202, and against the peace and dignity of the State of Tennessee.

/s/ W. MICHAEL McCOWN,
District Attorney General
17th Judicial District

COUNT TWO

THE GRAND JURORS of BEDFORD County, Tennessee, duly impaneled and sworn, upon their oath, present that:

DARYL KEITH HOLTON

on or about the 30TH DAY OF NOVEMBER, 1997, in BEDFORD County, Tennessee and before the finding of this indictment, intentionally, deliberately and with premeditation did kill BRENT HOLTON, AGE 10, in violation of Tennessee Code Annotated §39-13-202, and against the peace and dignity of the State of Tennessee.

/s/ W. MICHAEL McCOWN,
District Attorney General
17th Judicial District

COUNT THREE

THE GRAND JURORS of BEDFORD County, Tennessee, duly impaneled and sworn, upon their oath, present that:

DARYL KEITH HOLTON

on or about the 30TH DAY OF NOVEMBER, 1997, in BEDFORD County, Tennessee and before the finding of this indictment, intentionally, deliberately and with premeditation did kill ERIC HOLTON, AGE 6, in violation of Tennessee Code Annotated §39-13-202, and against the peace and dignity of the State of Tennessee.

/s/ W. MICHAEL McCOWN,
District Attorney General
17th Judicial District

COUNT FOUR

THE GRAND JURORS of BEDFORD County, Tennessee, duly impaneled and sworn, upon their oath, present that:

DARYL KEITH HOLTON

on or about the 30TH DAY OF NOVEMBER, 1997, in BEDFORD County, Tennessee and before the finding of this indictment, intentionally, deliberately and with premeditation did kill KAYLA MARIE HOLTON, AGE 4, in violation of Tennessee Code Annotated §39-13-202, and against the peace and dignity of the State of Tennessee.

/s/ W. MICHAEL McCOWN,
District Attorney General
17th Judicial District

Appendix F

State's Notice to Seek the Death Penalty
Dated April 20, 1998

IN THE CIRCUIT COURT FOR BEDFORD COUNTY, TENNESSEE

STATE OF TENNESSEE)

VS.) CASE NO. 14302

DARYL KEITH HOLTON)

STATE'S NOTICE TO SEEK THE DEATH PENALTY

Comes now the State of Tennessee, by and through it's representative, the Office of the District Attorney General for the Seventeenth (17th) Judicial District, and at this time, gives notice pursuant to T.R.C.P., Rules 12.3(b) and the prior Order of the Court of it's intent to seek and ask for the death penalty in the above-styled capital case against DARYL KEITH HOLTON.

Pursuant to T.R.C.P., Rule 12.3(b) the State would give notice of intent to rely upon the following statutory aggravating circumstances of T.C.A. 39-13-204:

1. The murder was committed against persons less than twelve (12) years of age and the defendant was eighteen (18) years of age, or older; T.C.A. 39-13-204(i)(1)

2. The defendant knowingly created a great risk of death to two (2) or more persons, other than the victim murdered during the act of murder; T.C.A. 39-13-204(i)(3)

3. The murder was especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death; T.C.A. 39-13-204(i)(5)

4. The defendant committed a "mass murder", which is defined as the murder of three (3) or more persons whether committed during a single criminal episode or at different times within a forty-eight (48) month period; T.C.A. 39-13-204(i)(12)

5. The defendant knowingly mutilated the body of the victim after death; T.C.A. 39-13-204(i)(13)

6. The victim of the murder was particularly vulnerable due to a significant handicap or significant disability, whether mental or physical, and at the time of murder the defendant knew or reasonably should have known of such handicap or disability. T.C.A. 39-13-204(i)(14)

This 20th day of April, 1998.

Respectfully submitted,

/s/ W. Michael McCown
District Attorney General
Seventeenth Judicial District

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have hand-delivered a true and exact copy of the foregoing Notice to defendant's attorney of record, Hon. John Dickey, 17th JDPD and Hon. Mike Randles, Asst. 17th JDPD, the 20th day of April, 1998.

/s/ W. Michael McCown

Appendix G

State's Supplemental Notice Seeking the Death Penalty Dated May 7, 1999

IN THE CIRCUIT COURT FOR BEDFORD COUNTY, TENNESSEE

STATE OF TENNESSEE)

VS.) CASE NO. 14302

DARYL KEITH HOLTON)

STATE'S SUPPLEMENTAL NOTICE SEEKING THE DEATH PENALTY

Comes now the State of Tennessee, by and through it's representative, the Office of the District Attorney General for the Seventeenth Judicial District, and pursuant to Rule 12.3(b), Tennessee Rules of Criminal Procedure, supplements the notice previously filed pertaining to the statutory aggravating circumstances upon which the State elects to rely:

1. The murder was committed against a person less than twelve (12) years of age and the defendant was eighteen (18) years of age, or older. Tennessee Code Annotated Section 39-13-204(i)(1). [This statutory aggravating circumstance applies to Counts 1, 2, 3, and 4.]

2. The defendant knowingly created a great risk of death to two (2) or more persons, other than the victim murdered, during the act of murder. Tennessee Code Annotated Section 39-13-

204(i)(3). [This statutory aggravating circumstance applies to Counts 1, 2, 3, and 4.]

3. The murder was especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death. Tennessee Code Annotated Section 39-13-204(i)(5). [This statutory aggravating circumstance applies to Counts 1, 2, 3, and 4.]

4. The defendant committed "mass murder," which is defined as the murder of three (3) or more persons whether committed during a single criminal episode or at different times within a forty-eight (48) month period. Tennessee Code Annotated Section 39-13-204(i)(12). [This statutory aggravating circumstance applies to Counts 1, 2, 3, and 4.]

5. The defendant knowingly mutilated the body of the victim after death. Tennessee Code Annotated Section 39-13-204(i)(13). [This statutory aggravating circumstance applies to Counts 1, 2, 3, and 4.]

6. The victim of the murder was particularly vulnerable due to a significant handicap or significant disability, whether mental or physical, and at the time of the murder the defendant knew or reasonably should have known of such handicap or disability. Tennessee Code Annotated Section 39-13-204(i)(14). [This statutory aggravating circumstance applies to Count 3.]

This 7th day of May, 1999.

Respectfully submitted,

/s/ W. Michael McCown
District Attorney General
Seventeenth Judicial District

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of this Notice has been mailed/delivered to the Office of the Public Defender, and Honorable John Appman, this 7th day of May, 1999.

/s/ W. Michael McCown
District Attorney General

Supreme Court, U.S.
FILED
JUL - 6 2004
OFFICE OF THE CLERK

No. 03-1621

In The
Supreme Court of the United States

DARYL KEITH HOLTON,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Tennessee

RESPONDENT'S BRIEF IN OPPOSITION

PAUL G. SUMMERS
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State of Tennessee

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CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Fifth and Fourteenth Amendments require state prosecutors to charge by indictment aggravating circumstances upon which a death sentence is sought in a state-court prosecution for capital murder.

2. Whether a criminal defendant's choice to forgo the presentation of mitigation evidence violates the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
STATEMENT OF THE CASE	1
ARGUMENT	2
I. THE FIFTH AND FOURTEENTH AMENDMENTS DO NOT REQUIRE STATE PROSECUTORS TO CHARGE BY INDICTMENT THE AGGRAVATING CIRCUMSTANCES UPON WHICH A DEATH SENTENCE IS SOUGHT IN A CAPITAL MURDER CASE	2
II. NEITHER THE EIGHTH AMENDMENT NOR THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT ARE VIOLATED WHEN A CRIMINAL DEFENDANT CHOOSES TO FORGO THE PRESENTATION OF MITIGATING EVIDENCE AND SO INSTRUCTS HIS COUNSEL	7
CONCLUSION	8

TABLE OF AUTHORITIES

Page

CASES

Apprendi v. New Jersey, 530 U.S. 466 (2000) 3

Commonwealth v. McKenna, 383 A.2d 174 (Pa. 1978) 7

Hurtado v. California, 110 U.S. 516 (1884) 3, 5

People v. Deere, 710 P.2d 925 (Cal. 1985) 7

Ring v. Arizona, 536 U.S. 227 (2002) 3, 4, 6

Ruff v. State, 978 S.W.2d 95 (Tenn. 1998) 5

State Farm Mutual Automobile Insurance Co. v. Duel, 324 U.S. 154 (1945) 7

State v. Dellinger, 79 S.W.3d 458 (Tenn.), *cert. denied*, 537 U.S. 1090 (2002) 4, 6

State v. Hale, 840 S.W.2d 307 (Tenn. 1992) 4

State v. Hill, 954 S.W.2d 725 (Tenn. 1997) 6

State v. Holton, 126 S.W.3d 845 (Tenn. 2004) 2

State v. Stephens, 127 Tenn. 282, 154 S.W. 1149 (1913) 5

Tipton v. State, 160 Tenn. 664, 28 S.W.2d 635 (1930) 5

Walton v. Arizona, 497 U.S. 639 (1990) 4

Wyatt v. State, 24 S.W.3d 319 (Tenn. 2000) 5

Zagorski v. State, 983 S.W.2d 654 (Tenn. 1998) 7

STATUTES

Tenn. Code Ann. §39-13-204 (1997) 6

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

28 U.S.C. §1257 1
U.S. Const. amend. V 2, 3, 4
U.S. Const. amend. VI 3, 4, 5
U.S. Const. amend. VIII 7, 8
U.S. Const. amend. XIV ..... *passim*
Tenn. Const. Art. I, §9 5
Tenn. Const. Art. I, §14 5
Tenn. R. Crim. P. 12.3 6

OPINIONS BELOW

The opinion of the Tennessee Supreme Court is reported at 126 S.W.3d 845 (Tenn. 2004). It is attached to the petition as Appendix ("App.") A at A-1. The opinion of the Tennessee Court of Criminal Appeals was filed on July 17, 2002. It is attached to the petition as App. B at A-46.

STATEMENT OF JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. §1257.

STATEMENT OF THE CASE

On April 20, 1998, petitioner was indicted by the Bedford County, Tennessee, Grand Jury for four counts of first degree murder for the premeditated murder of his children, ages 12, 10, 6 and 4. App. E at A-124-127. That same day the State served its notice of intent to seek the death penalty. That notice asserted the following aggravating circumstances applicable to each count: the murder was committed against persons less than twelve (12) years of age and the defendant was eighteen (18) years of age, or older; the defendant knowingly created a great risk of death to two (2) or more persons, other than the victim; the murder was especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse; the defendant committed a "mass murder"; the defendant knowingly mutilated the body of the victim after death; and the victim was particularly vulnerable due to a significant handicap or significant disability, . . . and at the time of the murder the defendant knew or reasonably

should have known of such handicap or disability. App. F at A-129-31. On May 7, 1999, the State filed a supplemental notice of intent, which relied upon all of the same aggravating circumstances but specified that the circumstance regarding a handicap or disability related only to count three, the murder of 6-year-old Eric Holton. App. G at A-133-135. Ultimately, the State relied solely upon the mass murder aggravating circumstance for all four of the murders, and the age of the victims and age of the defendant for the three murders involving the 10-, 6- and 4-year-old. The jury convicted the petitioner of four counts of first degree murder. At the sentencing hearing the jury found that the State had proven both aggravating factors – mass murder and age – as to the three youngest children, and they found the single aggravating factor of mass murder in the case of the oldest child. The jury sentenced petitioner to death on all four counts. App. A at A-1. The convictions and sentences were affirmed on direct review. *State v. Holton*, 126 S.W.3d 845 (Tenn. 2004), App. A at A-1.

ARGUMENT

I. THE FIFTH AND FOURTEENTH AMENDMENTS DO NOT REQUIRE STATE PROSECUTORS TO CHARGE BY INDICTMENT THE AGGRAVATING CIRCUMSTANCES UPON WHICH A DEATH SENTENCE IS SOUGHT IN A CAPITAL MURDER CASE.

Petitioner asks this Court to review the Tennessee Supreme Court's decision rejecting his argument that the Fifth and Fourteenth Amendments to the United States Constitution require that statutory aggravating circumstances, upon which the State relies in seeking the death

penalty, must be charged by indictment. Respondent submits, however, that review by this Court is unwarranted because Tennessee's capital sentencing scheme fully comports with this Court's decision in *Ring v. Arizona*, 536 U.S. 227 (2002). Moreover, petitioner has presented no compelling justification for a departure from the long-established rule in *Hurtado v. California*, 110 U.S. 516 (1884), that the federal right to presentment or indictment by a Grand Jury does not extend to the States through the Fourteenth Amendment. *See also Apprendi v. New Jersey*, 530 U.S. 466, 477 n.3 (2000) ("The [Fourteenth Amendment] has not . . . been construed to include the Fifth Amendment right to 'presentment or indictment of a Grand Jury' ").

In *Ring*, this Court held that Arizona's enumerated aggravating factors "operate as the functional equivalent of an element of a greater offense" and must be found by a jury, rather than a judge, under the Sixth Amendment's jury trial guarantee. *Ring*, 536 U.S. at 609. Applying *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court reasoned that, in absence of a finding of at least one statutory aggravating factor, the maximum punishment a defendant convicted of first degree murder can receive is life imprisonment. Because the effect of an aggravating circumstance is to increase the penalty beyond that authorized by the jury's verdict standing alone, that fact must be found by the jury beyond a reasonable doubt. *Ring*, 536 U.S. at 603-04. Unlike Tennessee, Arizona's capital sentencing statute permitted the trial judge, sitting alone, to determine the presence or absence of aggravating factors for imposition of the death penalty. *Ring*, 536 U.S. at 592-93 (citing Ariz. Rev. Stat. Ann. §13-703(C) (West Supp. 2001)). The Court's decision in *Ring*

thus overruled *Walton v. Arizona*, 497 U.S. 639 (1990), to the extent it allowed a sentencing judge, sitting without a jury, to find an aggravating circumstance.

Ring did not redefine first-degree murder as two distinct "offenses." Indeed, the power to define what shall constitute a state criminal offense is committed exclusively to the state legislature. *State v. Hale*, 840 S.W.2d 307, 314 (Tenn. 1992) (citing *Hall v. State*, 151 Tenn. 416, 418, 270 S.W. 84, 85 (1925)). Rather, the Court found that aggravating factors in a capital sentencing proceeding operate as the "functional equivalent" of an element of a greater offense and must, consistent with the Sixth Amendment, be determined by a jury. That requirement is plainly satisfied under Tennessee law.

As to the constitutional requirements for indictments in Tennessee, neither the United States Constitution nor the Tennessee Constitution requires that the State charge in the indictment the aggravating factors to be relied upon by the State during sentencing in a first-degree murder prosecution. *State v. Dellinger*, 79 S.W.3d 458, 467 (Tenn.), *cert. denied*, 537 U.S. 1090 (2002). This Court expressly declined to address the indictment issue in *Apprendi*, and the issue likewise was not implicated in *Ring*. In *Ring*, moreover, the Court noted that the Fourteenth Amendment "has not been construed to include the Fifth Amendment 'right to presentment or indictment of a Grand Jury.'" *Ring*, 536 U.S. at 597, n.4 (quoting *Apprendi*, 530 U.S. at 477, n.3).

For federal constitutional purposes, due process requires only that a defendant be "informed of the nature and cause of the accusation" against him. U.S. Const. amend. VI. The requirement for indictment in Tennessee

derives solely from Article I, §14, of the Tennessee Constitution, which provides "[t]hat no person shall be put to answer any criminal charge but by presentment, indictment or impeachment." It is a matter for the state legislature to determine what shall constitute the accusation and in what form the crime shall be charged. *Tipton v. State*, 160 Tenn. 664, 28 S.W.2d 635 (1930); *State v. Stephens*, 127 Tenn. 282, 154 S.W. 1149 (1913).

As this Court has previously recognized, the fact that the Federal Constitution's framers saw fit to provide a specific procedural guarantee against arbitrary accusations indicates the importance attached to the liberty interest at stake. It does not, however, guarantee any particular procedure in the various state courts. *Hurtado v. California*, 110 U.S. 516, 535 (1884). The Tennessee Supreme Court has recognized that the requirements of the Sixth and Fourteenth Amendments to the Federal Constitution and Article I, §9, of the Tennessee Constitution guarantee that an accused be informed of the nature and cause of the accusation against him.[1] Those constitutional provisions are met if the indictment: (1) provides notice to the accused of the offense charged; (2) provides the court with an adequate ground upon which a proper judgment may be entered; and (3) provides the defendant with protection against double jeopardy. *Wyatt v. State*, 24 S.W.3d 319, 324 (Tenn. 2000). *See also Ruff v. State*, 978 S.W.2d 95, 99-100 (Tenn. 1998) (rejecting challenge to indictment that failed to charge culpable mental state,

[1] Article I, §9, of the Tennessee Constitution provides, in pertinent part: "That in all criminal prosecutions, the accused hath the right . . . to demand the nature and cause of the accusation against him. . . ."

noting that, "[b]y this ruling, we wish to make clear that the Court has relaxed the strict pleading requirements of common law"); *State v. Hill*, 954 S.W.2d 725 (Tenn. 1997) (indictment need not conform to strict pleading requirements).

Petitioner was indicted in April of 1998 for the first degree murders of his four children, Stephen, Brent, Eric and Kayla, crimes which, by statute, carried only three possible penalties – life imprisonment, life imprisonment without the possibility of parole, or death. *See* Tenn. Code Ann. §39-13-204 (1997). Petitioner's indictments, therefore, placed him on notice of both the nature of the charge (first degree murder) and the potential penalties (death, life imprisonment or life imprisonment without parole). Tennessee's statute setting forth the aggravating circumstances the jury may consider in a first degree murder prosecution, Tenn. Code Ann. §39-13-204(i), as well as the state-law requirement that the prosecutor notify capital defendants no less than thirty days before trial of the intent to seek the death penalty and specify the aggravating circumstances upon which the State intends to rely, Tenn. R. Crim. P. 12.3, provided petitioner sufficient notice to satisfy the constitutional requirements of due process. *Dellinger*, 79 S.W.2d at 467 (Tenn. R. Crim. P. 12.3(b) "satisfies the requirements of due process and notice"). Further, in accordance with Tennessee law[2] and consistent with the constitutional mandate set forth in *Ring*, petitioner's *jury* found two aggravating circumstances in this case beyond a reasonable doubt.

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[2] *See* footnote 1, *supra* p. 4.

II. NEITHER THE EIGHTH AMENDMENT NOR THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT ARE VIOLATED WHEN A CRIMINAL DEFENDANT CHOOSES TO FORGO THE PRESENTATION OF MITIGATING EVIDENCE AND SO INSTRUCTS HIS COUNSEL.

Petitioner claims that the State of Tennessee has violated his Eighth and Fourteenth Amendment right to present, and have the jury consider, mitigating evidence during the sentencing phase of his trial by acceding to his demand that no mitigating evidence be presented beyond the testimony of a jailor who testified regarding petitioner's behavior during pretrial confinement. Because this claim was not presented in this manner in the state courts, this Court should decline review. *State Farm Mutual Automobile Insurance Co. v. Duel*, 324 U.S. 154, 160 (1945) (Supreme Court will not review claims that were not presented or passed upon by state court).

In any event, the sole authority upon which petitioner relies are cases in which, by statute or instruction, jurors were prevented from considering mitigation evidence sought to be introduced. In this case, the trial court followed the procedures set forth by the Tennessee Supreme Court in *Zagorski v. State*, 983 S.W.2d 654, 660-661 (Tenn. 1998), to ensure that petitioner's decision was intelligent and voluntary. App. B at A-95.

Petitioner acknowledges that this Court has never held that a criminal defendant may not choose to forgo the presentation of mitigating evidence. Pet. at 16. While it is true that a few states have held that an individual's right to determine the course of his representation may be subjugated to the public interest in the integrity of the judicial system, *People v. Deere*, 710 P.2d 925 (Cal. 1985); *Commonwealth v.*

McKenna, 383 A.2d 174 (Pa. 1978), this Court has never ruled so broadly. Moreover, this is not a case where no mitigating evidence was presented. As the Tennessee Supreme Court found, the defense presented mental health evidence related to petitioner's mental state at the time of the murders and during the period leading up to them. App. A at A11-13. While this evidence was offered as evidence of a possible insanity defense during the guilt phase, there was nothing that prevented the jury from further considering the evidence in mitigation during sentencing. Where, as here, a criminal defendant makes an informed decision to limit the type and quantity of mitigating evidence during the sentencing phase of his trial, such a decision does not violate the Eighth Amendment or due process.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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